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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
Case Nos. 08-13555 (JMP) ; 08-01420 (JMP) (SIPA)  
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In the Matter of:  
  
LEHMAN BROTHERS HOLDINGS INC., et al.  
Debtors.  
- - - - -x  
In the Matter of:  
  
LEHMAN BROTHERS INC.  
Debtor.  
- - - - -x  
United States Bankruptcy Court  
One Bowling Green  
New York, New York  
  
September 8, 2010  
9:36 AM  
  
B E F O R E:  
HON. JAMES M. PECK  
U.S. BANKRUPTCY JUDGE

1  
2 CONTINUED EVIDENTIARY HEARING re (i) Motion of Debtor to Modify  
3 the September 20, 2008 Sale Order and Granting Other Relief;  
4 (ii) Motion of the Trustee for Relief Pursuant to the Sale  
5 Orders or, Alternatively, for Certain Limited Relief Under Rule  
6 60(b); (iii) the Motion of Official Committee of Unsecured  
7 Creditors of Lehman Brothers Holdings Inc., Authorizing and  
8 Approving (A) Sale of Purchased Assets Free and Clear of Liens  
9 and Other Interests and (B) Assumption and Assignment of  
10 Executory Contracts and Unexpired Leases, Dated September 20,  
11 2008 (and Related SIPA Sale Order) and Joinder in Debtors' and  
12 SIPA Trustee's Motions for an Order Under Rule 60(b) to Modify  
13 Sale Order; (iv) All Joinders Thereto and Related Adversary  
14 Proceedings; and (v) Motion of Barclays Capital Inc. to Enforce  
15 the Sale Order and Secure Delivery of All Undelivered Assets  
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ALSO PRESENT: (TELEPHONICALLY)

MR. ANATOLY BUSHLER

For: FARALLON CAPITAL MANAGEMENT

1 P R O C E E D I N G S

2 THE COURT: Be seated, please.

3 MR. GAFFEY: May we proceed, Your Honor? We asked Ms.  
4 Leventhal to take the stand.

5 MR. SCHILLER: We had one scheduling question if we  
6 may ask before the --

7 THE COURT: Sure.

8 MR. SCHILLER: -- examination commences, Judge.

9 Because of the --

10 THE COURT: But you can certainly come to the stand  
11 while you ask that question.

12 MR. SCHILLER: Mr. Gaffey and I, we're not clear as to  
13 whether we could resume from 11:45 to 12:30 today and begin  
14 with the next witness before lunch break.

15 THE COURT: If you'd like to do it, that's fine.

16 MR. SCHILLER: Thank you. We would.

17 THE COURT: Then we will.

18 MR. SCHILLER: Thank you, Your Honor.

19 SHARI LEVENTHAL, WITNESS, PREV. SWORN

20 CROSS-EXAMINATION, CONTINUED

21 BY MR. GAFFEY:

22 Q Good morning, Ms. Leventhal.

23 A Good morning.

24 Q Before you is the ubiquitous book with your name on it.

25 If you could turn in that book to Exhibit 851. And as you do

1 that, the topic I want to address is a topic we were talking  
2 about it a bit yesterday, and that is your exchanges with Mr.  
3 Hughes -- well, with regard to the JPM issue.

4 And if you take a look at Exhibit 851, it is an e-mail  
5 from Mr. Hughes to you, a copy to Mr. Baxter, and it contains  
6 an e-mail chain that he has forwarded on to you. Do you  
7 recognize that document?

8 A Yes, just let me read it again because --

9 MR. GAFFEY: Your Honor, I move M-851 into evidence.

10 MR. SCHILLER: No objection, Judge.

11 THE COURT: It's admitted.

12 (Movant's Exhibit No. 851 was received.)

13 BY MR. GAFFEY:

14 Q Now, Ms. Leventhal, Mr. Hughes begins in that e-mail and  
15 commenting on the e-mail chain below by referring to an action  
16 of J.P. Morgan that quote, looks actively prejudicial to our  
17 interests, end quote.

18 Do you see that?

19 A Yes. May I read this, please?

20 Q Sure.

21 A Thank you. It's been a while.

22 All right. Yes, I see it.

23 Q Okay. You've had a chance to look the e-mail through?

24 A Yes, I have.

25 Q Why don't we start then at the first -- the earliest e-

1 mail in the chain at the bottom of the second page.

2 A Yes.

3 Q And that's an e-mail from Lindsee Granfield to Harold  
4 Novikoff with a copy to Robert Davis at Cleary.

5 Do you see that?

6 A Yes, I do.

7 Q Now, Mr. Davis at Cleary, just for clarity, was Mr. Davis  
8 a member of the team that represented the fed or the team that  
9 represented Barclays?

10 A The team that represented Barclays.

11 Q Okay. And in Ms. Granfield's e-mail, which Mr. Hughes  
12 forwards to you, she begins by saying, I have just heard  
13 something very disturbing, James Kobak, counsel for the  
14 trustee, said that a meeting that he was having with  
15 representatives of LBHI today, that LBHI brought up whether  
16 there was some settlement in the offing between JPM and  
17 Barclays, saying that JPM had told them of a settlement. Kobak  
18 said that the trustee did not reveal that a settlement was in  
19 the offing before LBHI asked the question. When did JPM tell  
20 LBHI of the settlement, what was said, and why was this done?  
21 This could be quite explosive, as to Barclays Capital.

22 Do you see that?

23 A Yes, I do.

24 Q All right. And was there some -- at this time, this e-  
25 mail chain -- well, this e-mail is dated November 21st, so



1 we've moved down the chronological chain a little bit toward  
2 the December settlement. Was there some plan or effort to keep  
3 the fact of the settlement negotiations from LBHI?

4 A I don't recall an active decision. I do recall that there  
5 was concern about release of the specific securities involved,  
6 because Barclays was still holding those in their portfolio,  
7 and there was concern that disclosure of the securities would  
8 impact Barclays' positions.

9 Q Barclays' position --

10 A In holding the securities that it was holding in its  
11 portfolio.

12 Q And if that were the reason, there was then a decision.  
13 Maybe plan or strategy is too strong a point, but there was a  
14 decision as late as November not to bring LBHI into the loop on  
15 whatever discussions were going on concerning the JPM/Barclays  
16 dispute?

17 A I believe at that point there was discussion as to whether  
18 the identity of the securities would be kept under seal,  
19 whether there'd be an application made to the Court to keep it  
20 under seal. So at that point I don't believe it had been  
21 disclosed. But I don't think there was ever an intention that  
22 there wouldn't be disclosure at some point prior to bringing it  
23 to the Court.

24 Q At some point. My questions go more to this point, which  
25 is around the 21st of November. Ms. Granfield seems to be

1 speaking not in terms of the identity of the particular  
2 securities, but about the fact of the settlement negotiations  
3 at all. Did you understand that to be what she meant when she  
4 said this could be quite explosive as to Barclays Capital?

5 A I honestly don't know what she meant by that statement.

6 Q Did you ever follow up to ask what Ms. Granfield meant  
7 when she said this could be quite explosive as to Barclays  
8 Capital?

9 A As I just said, I understood from Mr. Hughes, from a  
10 conversation with Mr. Hughes, I do recall that there was  
11 definitely concern about disclosure of the securities that were  
12 involved in the settlement. And so as a result, that's my  
13 recollection as to what the concern of disclosure was.

14 Q Okay. And so you don't have a recollection as you're here  
15 today about the larger question that I've asked, which is  
16 whether the plan was to keep LBHI out of the settlement  
17 negotiations?

18 A Well, they weren't a party to the settlement negotiations,  
19 but in terms of whether to keep them out of knowledge of it,  
20 no, I know that there was always an intention at some point  
21 that they were going to have to be brought in.

22 Q And the plan was, in fact, to tell them as late as  
23 possible in the process, wasn't it?

24 A No. I don't think that was ever the plan.

25 Q You'll see that in further up the chain Mr. Novikoff

1 writes back and explains how he thinks LBHI found out about it,  
2 and that's in his e-mail back to Ms. Granfield, a copy to Mr.  
3 Davis. Where he explains that J.P. Morgan has been seeking  
4 information from LBHI as to the loans and other assets  
5 underlying some very large ABCP and ABS positions.

6 And it's up on the screen there, you'll see that he  
7 explains that there was a meeting, and that further in the e-  
8 mail, we made a highly confidential presentation to Weil and  
9 A&M on November 6th, as to the then current state of the  
10 collateral liquidations at LBI.

11 A Uh-huh.

12 Q And then he says the following, unfortunately, the fact  
13 that we have held approximately six billion collateral value of  
14 securities from the liquidations stuck out like a sore thumb.  
15 We disclosed that they were being held for a proposed  
16 settlement, but did not give any of the terms or background  
17 information.

18 Do you see that?

19 A Yes, I do.

20 Q Did you have any conversations yourself with Mr. Novikoff  
21 about six billion in collaterals sticking out like a sore  
22 thumb, and that's how Weil may have cottoned on to the fact  
23 that there were settlement negotiations going on?

24 A No. I don't recall any conversations like that.

25 Q And I take note that at this point in November, was it

1 your understanding that J.P. Morgan Chase is valuing the  
2 collateral piece here of the proposed settlement at \$6 billion?

3 A That's what it appears to say.

4 Q Okay. Now, further up in the chain, we come to the e-mail  
5 -- well, Mr. Novikoff writes again and says, also, just to be  
6 clear, none of the securities set aside were identified. That  
7 goes to your point, doesn't it, about the identity of the  
8 particular securities at issue?

9 A Correct.

10 Q All right. And then Mr. Hughes writes to you and  
11 describes all this as actively prejudicial to our interests.

12 Do you see that?

13 A Uh-huh, yes.

14 Q And who did you understand Mr. Hughes to be referring to  
15 when he talked about our interests?

16 A Barclays' interests.

17 Q All right. And I see -- I note that Mr. Hughes has copied  
18 no one other than you and Mr. Baxter from the fed. You didn't  
19 understand them to be talking about the joint interests of the  
20 fed and Barclays, did you?

21 A Absolutely not.

22 Q And did you determine from Mr. Hughes why he believed it  
23 was actively prejudicial to Barclays' interests that LBHI had  
24 learned there were settlement discussions going on?

25 A Well, as the e-mail continues to say, it makes all the

1 more critical -- crucial the need to file the motion. Again,  
2 that was the motion to put the identity of the securities under  
3 seal, which is consistent with what I've been saying, which is  
4 the concern was, that those security identifies, the CUSIPs  
5 would be disclosed, that in turn, would affect Barclays'  
6 ability to manage that portfolio.

7 Q Was the concern that LBHI might have questions about the  
8 settlement and what it was about, and what the underlying  
9 dispute was?

10 A That was never a subject of discussion that I had with  
11 anyone.

12 Q So your understanding of Mr. Hughes is urging that the  
13 motion be filed as soon as possible, and under seal, if we can,  
14 doesn't read to you as if Mr. Hughes wants to move quickly  
15 under seal and not bring LBHI into the loop before all that's  
16 done?

17 A The idea as I understood it, was for filing with respect  
18 to requests that we file the identity of the securities under  
19 seal. That's my recollection.

20 Q And before I move on to another document, --

21 A Uh-huh.

22 Q -- as we've talked about this document --

23 A Uh-huh.

24 Q -- as you've looked at it more, you don't have -- do you  
25 any other explanation for why Ms. Granfield would've thought

1 this was all potentially explosive as to Barclays Capital?

2 A Not that I recall. My recollection was the securities.

3 There may have been something else, but my recollection was the  
4 securities.

5 Q And you don't recall following up on that sentiment, of  
6 trying to find out why it was potentially explosive to Barclays  
7 Capital?

8 A No. I remember having discussions with Mr. Hughes about  
9 the securities.

10 Q Now, further into November, by a couple of days, and I'd  
11 ask you to turn now to Exhibit 849, you'll find there an e-mail  
12 from you to Mr. Hughes entitled follow-up, dated November 25th,  
13 '08.

14 A Yes.

15 Q Would you take a look through it sufficiently to tell me  
16 whether you recognize the document?

17 A Yes, I do.

18 Q All right. And that's an e-mail that you sent to Mr.  
19 Hughes attaching a draft of the declaration that ultimately  
20 came to be filed in the settlement motion, yes?

21 A Yes.

22 MR. GAFFEY: Your Honor, I move Exhibit M-849 into  
23 evidence.

24 MR. SCHILLER: No objection.

25 THE COURT: It's admitted.

1 (Movant's Exhibit No. 849 was received.)

2 BY MR. GAFFEY:

3 Q Now, Ms. Leventhal, we talked a bit yesterday about the  
4 fed's role as a -- and again, I'm using Mr. Schiller's word,  
5 mediator here. I note that your e-mail does not copy anybody  
6 from J.P. Morgan Chase. Did you send a draft of your e-mail of  
7 your declaration to J.P. Morgan Chase at any point?

8 A Yes, we did.

9 Q And you did that after Mr. Hughes had had an opportunity  
10 to look at it and suggest changes of his own; isn't that right?

11 A No. Actually, I believe we had sent it to the trustee,  
12 and I believe the trustee had shared it with Chase. The  
13 trustee also gave me the okay to share it with Mr. Hughes. We  
14 weren't going to share it with either of the parties until the  
15 trustee said it was okay, because it was the trustee's motion  
16 that we were supporting.

17 Q I will tell you, we had a small discussion about this  
18 yesterday --

19 A Uh-huh.

20 Q -- and I've gone -- we'll mark in a moment. I've gone  
21 back and checked the document productions.

22 A Uh-huh.

23 Q And we find -- and I'll show it to you. The earliest we  
24 have found who's sending your declaration to Mr. Novikoff is in  
25 early December. So the reason -- that's the reason why I ask

1 the following question.

2 A Uh-huh.

3 Q Was the process that was followed here, Mr. Hughes gets to  
4 look at the declaration, makes his suggestions, and that  
5 revised declaration is sent off to J.P. Morgan Chase?

6 A My recollection is we shared the declaration with the  
7 trustee. The trustee then said that it was all right if we  
8 shared it with Mr. Hughes, because apparently, as I think is  
9 reflected in here somewhere, there was some communication back  
10 and forth between the trustee, and Mr. Hughes had some concerns  
11 about the accuracy of something that was in the declaration.

12 I don't recall the timing precisely, but there was never a  
13 plan as to how it was going to be shared. It was our view that  
14 it was the trustee's call as to when this was shared with the  
15 parties.

16 Q And apart from whether you remember it wasn't planned, do  
17 you remember one way or the other whether that was, in fact,  
18 the sequence?

19 A No, I don't remember.

20 Q All right. And if you would turn now please to Exhibit  
21 848 -- actually, just before you do, would you take a look at  
22 paragraph 12 of your draft that you sent to Mr. Hughes?

23 A Uh-huh.

24 Q And one thing we talked about a bit yesterday was in  
25 paragraph 12, which is at page 76404 -- there you go.



1 A Uh-huh.

2 Q Whether or not Mr. Hughes has suggested any changes  
3 regarding revealing the ratio of cash to collateral. Do you  
4 recall that?

5 A Yes.

6 Q And you pointed me to this paragraph and what was the  
7 final, where you say, this ratio is consistent with the ratio  
8 of cash and collateral, et cetera.

9 Do you see that?

10 A Yes, I do.

11 Q All right. I'd just like you to keep that paragraph in  
12 mind as we move on to the next exhibit.

13 A Okay.

14 Q And the next exhibit is 848.

15 A Okay.

16 Q Now, 848, Ms. Leventhal, again is an exchange between Mr.  
17 Hughes and you, and it's an e-mail from Jonathan Hughes to you  
18 dated November 28th, 2008.

19 Do you see that?

20 A Yes.

21 Q Again, I'll ask you to take a look at it and tell me  
22 whether you recognize it to be correspondence between you and  
23 Mr. Hughes?

24 A I do.

25 MR. GAFFEY: And, Your Honor, I move in Exhibit 848.

1 MR. SCHILLER: No objection.

2 THE COURT: It's admitted.

3 (Movant's Exhibit No. 848 was received.)

4 BY MR. GAFFEY:

5 Q Now, Ms. Leventhal, in this e-mail, Mr. Hughes sends back  
6 to you some suggested changes to your drafts.

7 Do you see that he's saying that there?

8 A Yes, I do.

9 Q All right. And the copy that's attached at least to this,  
10 and I'm not sure if it's a function of how documents are kept  
11 on our system or Mr. Hughes', but it's not black lined.

12 A Right.

13 Q But take a look at paragraph 12 if you would.

14 A Yes.

15 Q And you'll see that it says here, the ratio was  
16 consistent, and that's the same paragraph 12 that we spoke  
17 about a moment ago, right?

18 A Yes.

19 Q Okay.

20 A And the word collateral is changed to the word securities,  
21 yes, I see that.

22 Q Yes, okay.

23 Now, did you take the changes that Mr. Hughes suggested in  
24 your affidavit?

25 A I don't believe I took all of them, but I do recall that

1 he had an issue with using the word collateral, and I brought  
2 it to some of our -- some lawyers who are more expert in repos  
3 than I am, and asked them what their view was. And they, as I  
4 recall, took the position that he was correct, that collateral  
5 really wasn't the most accurate word to use in connection with  
6 a repo and the appropriate term would've been securities,  
7 because it's a repurchase agreement, not a loan.

8 Q Okay. Now, I have to confess to error here, I asked you  
9 to keep the wrong paragraph in mind. Could you turn back to  
10 849 for a moment?

11 A Sure.

12 Q And within 849, which is the draft that you sent off to  
13 Mr. Hughes, take a look at paragraph 9.

14 A Yes.

15 Q Okay. And in the last sentence of paragraph 9 of that  
16 draft, which you sent to Mr. Hughes --

17 A Uh-huh.

18 Q -- the last sentence said, in total, the New York Fed had  
19 loaned LBI \$46.22 billion in cash and treasury securities  
20 against 50.62 billion in collateral, reflecting a 1 to 1.1  
21 ratio of cash or cash equivalents loaned to non-cash collateral  
22 received.

23 Do you see that?

24 A Yes, I do.

25 Q All right. And then if you'd turn to 848 --

1 A Uh-huh.

2 Q -- again to that paragraph, and again look at the last  
3 sentence. One of Mr. Hughes' suggestions was to remove the  
4 reference to the specific ratio; is that right?

5 A Yes, I believe that is right.

6 Q And that's a change that you took in the -- that you put  
7 -- that made its way all the way into the final of your  
8 declaration.

9 A That's correct. And in part that was because I wasn't  
10 comfortable making a declaration as to the ratio, because there  
11 was some concern as to how that had been calculated.

12 Q All right. And Mr. Hughes, apparently, was uncomfortable  
13 with it, too, because he's the one that suggested it come out.

14 A He did. But I will be honest with you, that we were  
15 debating whether that was to stay in for a while. I had talked  
16 to the same people that I was talking to about the word  
17 collateral weren't comfortable, I wasn't a hundred percent  
18 comfortable as a lawyer making that kind of an assertion, so.

19 Q Well, the word collateral's still in there. My question  
20 goes to this --

21 A Yeah, because they were fine on that.

22 Q My question goes to the removal of the --

23 A Yep.

24 Q -- specific ratio.

25 A Exactly, yeah.

1 Q And do you have a recollection of the degree to which you  
2 accepted the changes that Mr. Hughes suggested in your  
3 declaration?

4 A I don't recall. I mean, they were fairly minor changes as  
5 I remember. I remember the collateral securities issue in  
6 particular, because I remember raising that with people. I  
7 don't offhand remember the rest of them, but I don't think they  
8 were particularly extensive.

9 Q Okay. Would you take a look in your book at Exhibit M-850  
10 -- M-885?

11 A Yes.

12 Q Now, I will tell you, Ms. Leventhal, I'm going to offer  
13 this document as a demonstrative. We prepared this in our  
14 office, and it's a black lined version that --

15 A Uh-huh.

16 Q -- compares the version Mr. Hughes sent back to you  
17 against the version that you sent to him.

18 A Uh-huh.

19 Q And the black line indicates the changes that were made.

20 A Uh-huh.

21 Q Can you take a look through that, and tell me whether this  
22 -- let's just leaf through the pages a little bit.

23 Go to page 2, you'll see he's made a change in paragraph

24 3.

25 A Yep.

1 Q And go to page three, and you'll see he's made changes in  
2 paragraphs 8 and 9.

3 A Right.

4 Q And if you go to page 4, you'll see he's made changes in  
5 paragraphs 10, 11, 12 and 14?

6 A Honestly without going line-by-line through what he sent  
7 me and what I had sent him, I can't actually tell you if this  
8 is correct, but if you're telling me you did it, I'm not -- it  
9 looks about right, in terms of number of changes that were  
10 proposed.

11 MR. GAFFEY: Okay. Your Honor, I offer this for  
12 demonstrative purposes only.

13 MR. SCHILLER: Your Honor, we haven't had a chance to  
14 do this comparison.

15 THE WITNESS: Right.

16 MR. SCHILLER: We prefer to do that before readily  
17 agreeing to its admission.

18 THE COURT: I'm sorry. What was that?

19 MR. SCHILLER: I would prefer to have the opportunity  
20 to check a demonstrative like this --

21 THE WITNESS: Yeah.

22 MR. SCHILLER: -- before I readily agree. The witness  
23 can't tell and I can't tell.

24 THE COURT: Fine. Why don't we do this. It's being  
25 offered for demonstrative purposes only, subject to the ability

1 of Barclays through counsel to verify that this is, in fact, a  
2 fair representation of the changes made in the drafts, and I'm  
3 going to accept it, subject to such modification as may be  
4 required upon a further check, but it's really just for  
5 illustrative purposes and nothing more.

6 But if it turns out that there's some mistake made in  
7 the black lining we'll find --

8 MR. GAFFEY: If there's a mistake.

9 THE COURT: -- that out soon enough.

10 (Movant's Exhibit No. 885 was received.)

11 MR. GAFFEY: Thank you, Your Honor.

12 BY MR. GAFFEY:

13 Q Would you turn to paragraph 24?

14 A Just looking -- just offhand looking at this --

15 Q Uh-huh.

16 A -- some of the change, I don't know if you're trying to  
17 say that these were the changes he proposed that we took,  
18 because there are changes in here that are not in the final  
19 declaration.

20 Q Yeah. These are the changes that Mr. Hughes proposed.

21 A Oh.

22 Q Okay?

23 A Okay. So --

24 Q I could, if you want to take the time, I can highlight the  
25 ones that wound up in the final.

1 A All right. Well, I don't have a view on that. If you  
2 want to do it, go right ahead, but.

3 Q Well, I think I won't take your time, and whatever I want  
4 to argue about that, I can argue later.

5 A Okay.

6 Q All right. So this reflects the changes from Mr. -- from  
7 your draft --

8 A Uh-huh.

9 Q -- that Mr. Hughes put --

10 A Right.

11 Q And we've agreed that the change with regard to removing  
12 the specific collateral ratio is one that wound up in the  
13 final, right?

14 A Correct.

15 Q And I'll ask you again, I'll ask you to take a look at  
16 paragraph 24, where it reflects Mr. Hughes proposed a change to  
17 the last sentence. It read in your version, and I'll read  
18 without the black line, it is also in the New York Fed's  
19 opinion consistent with what Barclays intended to represent to  
20 the Court in the clarification link.

21 Do you see that through the black line?

22 A Yes.

23 Q And what Mr. Hughes suggest it be changed to, is it also  
24 in the New York Fed's opinion consistent with the intent of the  
25 clarification letter.



1 A Correct.

2 Q And do you remember if you took that change in the final?

3 A I believe I did.

4 Q All right. And do you know why Mr. Hughes wanted to  
5 remove a reference to what Barclays intended to represent to  
6 the Court?

7 A No. I think, though, from my perspective it was cleaner,  
8 the language looked cleaner, and I didn't really see any  
9 difference in the meaning.

10 Q So I take it you had no conversation that you recall with  
11 Mr. Hughes about the change where he took out a reference to  
12 Barclays' --

13 A No.

14 Q -- intention to represent something to the Court?

15 A No. The only discussion I recall specifically is on the  
16 collateral versus securities, because he felt strongly that it  
17 was the wrong word. I wasn't convinced. I went to people, and  
18 so I do recall that. I don't recall this particular change,  
19 because it didn't seem significant in any way.

20 Q I'd like to move a little further along in time toward the  
21 December settlement, and ask you to turn to Exhibit M-850 in  
22 your book.

23 Now, Exhibit 850, Ms. Leventhal, is another e-mail from  
24 Jonathan Hughes to you in an e-mail chain below, same question.  
25 Would you look through it and tell me sufficiently whether you

1 recognize it?

2 A Okay. Yes.

3 MR. GAFFEY: All right. And, Your Honor, I offer  
4 Exhibit M-850 into evidence.

5 MR. SCHILLER: No objection, Judge.

6 THE COURT: It's admitted.

7 (Movant's Exhibit No. 850 was received.)

8 BY MR. GAFFEY:

9 Q Now, Ms. Leventhal, if you would turn to -- again, I want  
10 to move sequentially, so go to the last e-mail in the chain.

11 A Yes.

12 Q And it's an e-mail from you to Jonathan Hughes.

13 A Uh-huh. Uh-huh.

14 Q In which you say, here is the current version of my  
15 declaration. As you will see, I accepted most of your proposed  
16 changes. And then you referred to Jeff Moore (ph) reviewing  
17 suggested edits to his declaration.

18 A Uh-huh.

19 Q And while he thinks they are fine, he would like to see  
20 the actual Schedule A, et cetera, et cetera.

21 Do you see that?

22 A Yes, I do.

23 Q Do you recall that the fed put in two affidavits in  
24 connection with the December settlement motion?

25 A Yes, I do.

1 Q And one was yours and one was Mr. Moore's; is that right?

2 A Correct, yes.

3 Q And what did Mr. Moore do? What's his job?

4 A As I think I said yesterday, he was the valuation person  
5 in our markets group and --

6 Q And do you know what changes Mr. Hughes suggested to the  
7 declaration of the valuation guide from the feds?

8 A I certainly don't recall them now.

9 Q Have you seen copies of the changes Mr. Hughes suggested  
10 to Mr. Moore's declaration?

11 A I'm sure I did at the time, but I have no recollection as  
12 to what they were now.

13 Q Do you know where those documents would be now? I have  
14 not seen them?

15 A I don't know. Mr. Moore's e-mails may not have been on a  
16 litigation hold at that point, so I'm not sure that they still  
17 exist, but we can look.

18 Q So -- now further up in the chain, Mr. Hughes responds to  
19 you, and he's checking the schedule, that's what you referred  
20 to and Mr. -- with regard to Mr. Moore's declaration, he says  
21 he'll send it.

22 And then in the second paragraph he says this, on the  
23 assumption that the two fed affidavits and our affidavit can be  
24 concluded today, do you think we can shoot for a filing on  
25 Wednesday? We may need to have a meeting with LBHI just ahead

1 of the filing, but my hope is that all parties might be able to  
2 do that tomorrow.

3 Do you see that?

4 A Yes, I do.

5 Q All right. And again, we have -- now, this is on December  
6 1st, 2008. Do you know if LBHI has yet been brought into the  
7 loop that there's a settlement in the offing?

8 A I don't know, although it does sound like the file, you  
9 know, you showed me said that they had -- that they were aware  
10 that there was a settlement in the offing. I don't know what  
11 they knew or when they knew it.

12 Q Let's distinguish between two things. I'm not asking you  
13 whether LBHI began to figure out there might be settlement  
14 discussions.

15 A Uh-huh.

16 Q I'm asking if anybody in this conversation, between you  
17 and Mr. Hughes --

18 A Uh-huh.

19 Q -- brought LBHI in the loop and told them there were  
20 settlement discussions?

21 A I certainly did not. I don't -- I do recall the trustee  
22 was having discussions. I don't know when those took place in  
23 the timeline.

24 Q And you weren't party to those discussions?

25 A No.

1 Q Okay. And when Mr. Hughes sent you this suggestion that  
2 we may have to have a meeting with LBHI just ahead of the  
3 filing --

4 A Uh-huh.

5 Q -- did you know why he didn't want to have it till just  
6 ahead of the filing?

7 A I didn't get the sense that it was that he didn't want to  
8 have it until just ahead. It was just that he was in a hurry  
9 to get the settlement done and was looking to have LBHI, if  
10 they were going to be, it was going to be just ahead of it. I  
11 didn't take it as a plan, more as a fact of where we were in  
12 the timeline.

13 Q Well, the reason I ask is he doesn't say something like,  
14 we should meet with LBHI as soon as possible. He says, we may  
15 need to have a meeting with LBHI just ahead of the filing.

16 Does that suggest to you that the plan was to keep LBHI  
17 out of the loop until the last possible minute?

18 A Well, given that the e-mail was sent on Monday, and he's  
19 talking about filing on Wednesday, there doesn't seem to be a  
20 whole lot of time in between those two, so.

21 Q Well, it's a settlement that involves some seven billion  
22 dollars, right?

23 A Right.

24 Q So with a seven billion dollar settlement, if you wanted  
25 to get something done, you might pick up the phone and make the

1 call on Monday, right?

2 A I can't say what Mr. Hughes was thinking.

3 Q So my question then is, in a seven billion dollar matter,  
4 do you know why Mr. Hughes is writing to you that we may need  
5 to have a meeting with LBHI just ahead of the filing?

6 A Again, I didn't put any import on the just ahead, other  
7 than that it was a temporal comment.

8 Q Now, the next document I want to show you, Ms. Leventhal,  
9 is not in your book.

10 MR. GAFFEY: Can I have --

11 THE WITNESS: I thought everything was in this book,  
12 given the size.

13 MR. GAFFEY: Your Honor, may I approach?

14 THE COURT: Yes. Thank you.

15 BY MR. GAFFEY:

16 Q Now, Ms. Leventhal, Exhibit 887 is an e-mail from Robert  
17 Davis to you with bccs, blind copies, to M. Huang at Boies  
18 Schiller, Jonathan Schiller at Boies Schiller, Lindsee  
19 Granfield at Cleary, and Jonathan Hughes at Barclays Capital.

20 A Uh-huh.

21 Q Do you see that?

22 A Yes, I do.

23 Q And it's regarding a declaration.

24 A Yes.

25 Q All right. Now, would you take a look through this, again

1 the same question, sufficiently to let me know whether you  
2 recognize the document.

3 A Yeah, I recognize it, it's an e-mail chain.

4 MR. GAFFEY: All right. Your Honor, I move M-887 into  
5 evidence.

6 MR. SCHILLER: No objection.

7 THE COURT: It's admitted.

8 (Movant's Exhibit No. 887 was received.)

9 BY MR. GAFFEY:

10 Q Now, Ms. Leventhal, here we have Mr. Davis, who's  
11 representing Barclays, saying to you, I cannot sign on that  
12 change tonight without first speaking to Hughes and others. I  
13 will try to revert to you about this first thing in the  
14 morning, assuming I catch Hughes in time. Please do not  
15 circulate this to anyone else until I'm able to obtains  
16 Barclays' views, thanks.

17 Do you see that?

18 A Yes, I do.

19 Q Do you recall the context of this conversation, this e-  
20 mail conversation?

21 A I recall that we had received a mark-up or some kind of  
22 requested change from counsel for JPMC. I believe the change  
23 had to do with how the account that was Chase's account at  
24 JPMC, the account that had been holding the seven billion, how  
25 that was characterized in the declaration.

1 I recall JPMC wanted to characterize differently. We  
2 didn't have a problem with their proposed characterization, but  
3 we wanted to make sure that Barclays was also comfortable with  
4 it, since we would be characterizing an account that was theirs  
5 too. So we sent it to Barclays. I sent it to Robert, I guess,  
6 and I guess this was his response.

7 Q And do you know why Mr. Davis -- that's who you mean by  
8 Robert, right?

9 A Yes.

10 Q All right. Do you know who Mr. Davis -- why Mr. Davis  
11 bcc'd Ms. Granfield, who was counsel to Barclays, and Mr.  
12 Schiller, who by now is counsel to Barclays, and Mr. Hughes?

13 A No, I don't know why, although I can take an educated  
14 guess.

15 Q I'm not going to ask you to do that. I just want to know  
16 what your personal knowledge is. You don't know why?

17 A No, I do not.

18 Q All right. And you'll see at the bottom of this first  
19 page, just to put this e-mail into context is an e-mail from  
20 Mr. -- from you to Mr. Davis --

21 A Uh-huh.

22 Q -- where you say, Bob, Hal Novikoff proposed the changes  
23 reflected in the attached mark-up. I have no objection to the  
24 characterization to be counted to you. And that's the e-mail  
25 to which Mr. Davis is responding, saying he's got to check with



1 Hughes, and don't share it with anybody else until I do, right?

2 A Right.

3 Q Okay. Now, if you would take a look at the -- we're on  
4 the 2nd of December now. You see that from the top of the e-  
5 mail, right?

6 A Yes.

7 Q And that's also the date of your e-mail to Mr. Davis at  
8 Cleary, right?

9 A Correct.

10 Q All right. Now, take -- and you attach the mark-up that  
11 you received from Mr. Novikoff at Wachtell, right?

12 A Yes.

13 Q And he's counsel to J.P. Morgan Chase, yes?

14 A Yes.

15 Q Okay. Take a look again at paragraph 9.

16 A Yes.

17 Q And you'll see that in a black line that Mr. -- well, just  
18 so we know it's a black line, take a look, for example, at page  
19 17. I'm sorry, paragraph 17.

20 A Yes.

21 Q And paragraph 15 above it?

22 A Right.

23 Q And you see that there's black line changes there and  
24 they're reflected both by a change in the wording and a line  
25 down the margin.

1 A Yes.

2 Q And a blank paragraph in there that would indicate no  
3 changes on that particular text offered by Mr. Novikoff, right?

4 A Correct.

5 Q All right. Take a look again at paragraph 9.

6 A All right.

7 Q And again, the last sentence there, there's no reference  
8 in that sentence to the particular collateral ratios.

9 A Correct.

10 Q Does that indicate to you that Mr. Novikoff only got a  
11 mark-up, a draft to mark up after Mr. Hughes was done with it?

12 A No.

13 Q Have you found any evidence of any earlier sharing of your  
14 declaration with Mr. Novikoff than the draft that's attached  
15 here?

16 A I honestly don't know, because I again don't know when the  
17 trustee shared a draft with Mr. Novikoff or with anyone at  
18 Chase. It may have been Steve Cutler. I don't recall if we  
19 shared it at any other point. This just indicates this  
20 particular draft that was going back and forth was the draft  
21 that no longer had the ratio in it.

22 Q Let me show you what we've marked as Exhibit 886. Again,  
23 not in your book.

24 MR. GAFFEY: So if I may approach, Your Honor?

25 THE COURT: Yes.

1 Q Now, Exhibit 886, Ms. Leventhal, is a copy of the same e-  
2 mail, this time produced by the fed. You'll be able to tell  
3 that from the Bates numbers at the bottom.

4 A Yes.

5 Q Well, that one is not black lined. Do you recognize that  
6 document?

7 A Yes.

8 MR. GAFFEY: I move M-886 into evidence, Your Honor.

9 MR. SCHILLER: No objection.

10 THE COURT: It's admitted.

11 (Movant's Exhibit No. 886 was received.)

12 BY MR. GAFFEY:

13 Q Now, Ms. Leventhal, I will represent to you, we've gone  
14 through the fed's production, which you mentioned yesterday.  
15 We did that last night.

16 A Uh-huh.

17 Q This is the earliest version we find of an e-mail -- of  
18 that e-mail of anything sent to the fed. Are you --

19 A Right.

20 Q -- in a position today to say that a draft was sent any  
21 earlier than this one? That is --

22 A No.

23 Q -- at any point before Mr. Hughes made changes to your  
24 declaration?

25 A I'm not in a position to say one way or another.

1 Q Okay. Now, if you'd go back to 850.

2 A Yes. Okay.

3 Q I wanted to ask you a question about -- this is back on  
4 December 1. I wanted to ask you a question about one more e-  
5 mail in here, and that's yours to Mr. Hughes. It's here on the  
6 first page dated December 1.

7 A Uh-huh.

8 Q Where you say, thank you for the schedule, I will review  
9 your affidavit as soon as you send it.

10 I take it you're referring there to a draft affidavit of  
11 the Barclays person who's going to put in an affidavit?

12 A Yes, that's why --

13 Q And that we find out later, turns out to be Mr. Laraca  
14 (ph), correct?

15 A Correct.

16 Q All right. And you reviewed Mr. Laraca's declaration  
17 before it was put in on the 7th?

18 A I believe that's correct.

19 Q All right. And then you say the following in the bottom,  
20 we will support an application to seal those portions of the  
21 papers that we all agree should be sealed. Tom does not think  
22 calling the judge about the notice schedule is a good idea.

23 Do you see that?

24 A Yes.

25 Q And the Tom you referred to there is Mr. Baxter?

1 A Yes, it is.

2 Q And do you have a recollection as to why Mr. Baxter  
3 thought not calling the judge about a notice schedule was a  
4 good idea?

5 A I don't. I remember there was some issue with scheduling  
6 and we decided we didn't want to raise it, but I don't recall  
7 what it was.

8 Q Let me suggest to you that between keeping LBHI out of the  
9 loop and between Mr. Hughes' urging that the meeting with LBHI  
10 take place at the last minute, file as soon as possible, and  
11 under seal, that the plan is to rush this motion through so it  
12 gets as little comment as possible?

13 A No. I don't believe that was ever the plan. In fact, I  
14 know that was never the plan.

15 The sealing was with respect to the CUSIPs as I've said, I  
16 recall that. And then as far as the notion that we were  
17 keeping something from LBHI, the motion was going to be filed,  
18 LBHI was going to have an opportunity to respond to it.

19 I'm not sure I follow what your argument is here, other  
20 than that --

21 Q Well, the plan was to get the motion on file before LBHI  
22 got an opportunity to say anything about it, right?

23 A No. I don't think that was ever the plan, in fact, I note  
24 we were saying we'll host -- we would be happy to host the LBHI  
25 meeting. But beyond that, it doesn't make sense, because if

1 you're filing a motion, obviously any party can object to it,  
2 so I'm not clear as to what we would've been keeping from LBHI.

3 Q And beyond that, you're not able to tell the Court why Mr.  
4 Baxter thought calling the judge about the notice schedule was  
5 not a good idea?

6 A Because I recall there was an issue that we were  
7 discussing raising on the scheduling, and I think at the end,  
8 we decided we were going to just go with whatever schedule the  
9 judge said, and we weren't going to try to change. Because I  
10 think there were some concern about the holiday period  
11 approaching, and we decided we were just going to go with it.

12 Q Would you turn in your book --

13 A But I don't recall specifically.

14 Q I'm sorry to interrupt. Would you turn in your book to  
15 Exhibit 119.

16 A Uh-huh.

17 Q And 119 you'll see is a copy of the settlement motion  
18 itself.

19 A Right.

20 Q And I show that to you just to secure your agreement that  
21 was filed on or around the 5th of December 2008.

22 A Correct.

23 Q All right. And would you turn now to Exhibit 858?

24 A Yes.

25 Q Actually, if you would instead, would you turn to 859. I

1 had the number wrong.

2 Now, Exhibit M-859, Ms. Leventhal, is an e-mail from  
3 Robert Davis at Cleary to you. Take a look at it, please, and  
4 tell me whether you recognize the document.

5 A Yes, I do.

6 Q And you recognize this to be correspondence between the  
7 two of you about the settlement motion, yes?

8 A Yes, I believe so.

9 MR. GAFFEY: Your Honor, I offer M-859.

10 MR. SCHILLER: No objection.

11 THE COURT: It's admitted.

12 (Movant's Exhibit No. 859 was received.)

13 BY MR. GAFFEY:

14 Q Now, Ms. Leventhal, in 859, the first paragraph is Mr.  
15 Davis relating to you his understanding that Jonathan Hughes  
16 sent you an e-mail with respect to the cryptic voice mail  
17 message he received from Weil, --

18 A Uh-huh.

19 Q -- today indicating that they will not be objecting to our  
20 settlement. I believe Jonathan plans to speak to them directly  
21 to confirm later today.

22 Do you see that?

23 A Yes, I do.

24 Q Did you ever get any further detail on that?

25 A I don't believe I did or if I did, I don't remember what

1 it was.

2 Q And then the second paragraph asks, when would be a  
3 convenient time Friday afternoon for Lindsee Granfield and  
4 Jonathan Schiller to meet with you and your in-house counsel to  
5 prep for the hearing.

6 Do you see that?

7 A Yes, I do.

8 Q Did you ever sit down with counsel for J.P. Morgan Chase  
9 to be prepped for the hearing?

10 A I don't believe I did, because I was scheduled to leave  
11 for Colorado, and I recall I left with my family and then flew  
12 back for the hearing, so I don't believe there ever ended up  
13 being an opportunity to sit down to talk about the hearing.

14 Q Okay. Just so I understand your answer, are you saying  
15 there was no opportunity to meet with Ms. Granfield and Mr.  
16 Schiller?

17 A Correct.

18 Q All right. Let me rephrase my question then. Was there  
19 ever any plan to sit down with anybody from Weil, Gotshal and  
20 prep for the hearing?

21 A No, there was not.

22 Q Was there ever any plan to sit down with anybody from J.P.  
23 Morgan Chase to prep for the hearing?

24 A No. And there was never a plan to meet with them because  
25 it never happened. They requested it and we couldn't do it.



1 Now, I don't recall if at the time we decided we didn't want to  
2 do it, which may have been the case, but we ultimately didn't  
3 do it.

4 Q Did you write back to anybody and say I don't want to meet  
5 with -- we're a mediator here, I don't want to meet with just  
6 one party to prep for the hearing. Do you recall doing that?

7 A I don't recall whether we did or didn't. I don't know.

8 Q Do you recall allowing to anybody involved that there was  
9 -- of asking why a proposal was made to meet with Ms. Granfield  
10 representing Barclays and Mr. Schiller representing Barclays  
11 and no one else to prep for the hearing?

12 A If Chase had wanted to meet, I'm sure we would've had the  
13 same reaction. It would've been -- we weren't looking to favor  
14 one side over another.

15 Q Now --

16 A We were looking to have the settlement approved because we  
17 felt that it was in the best interests of all parties.

18 That's --

19 Q Not quite what I asked. What I asked is, whether you ever  
20 expressed the sentiment at the time that you weren't going to  
21 meet with counsel for only one party in this settlement, to  
22 prep for the hearing?

23 A I don't recall. I know I never met with them.

24 Q Would you turn to Exhibit 398, please? At 398 you'll see,  
25 Ms. Granfield (sic), which is in evidence, is the objection of

1 the creditors' committee to the proposed settlement.

2 Do you see that?

3 A Yes, I do.

4 Q And I put that in front of you again just for a time post.  
5 The motion's filed, then the creditors' committee objects  
6 during December, and you recall that there was a hearing on the  
7 22nd of December of 2008; is that right?

8 A Yes.

9 Q All right. Now, do you recall being given to understand  
10 that one of the objections of the creditors' committee that  
11 ultimately was made to the settlement was, the fact that it  
12 felt it didn't have enough information about the transaction?

13 A I do recall that vaguely.

14 Q Okay. And do you recall that at the hearing, Mr. Miller  
15 from Weil, Gotshal expressed similar sentiments?

16 A That I don't recall, but I do recall the creditors'  
17 committee.

18 Q You do recall at the hearing the creditors' committee  
19 saying they wanted to conduct further inquiry or investigation  
20 into the facts concerning the sale transaction?

21 A Yes, I do recall that.

22 Q And you recall -- do you generally recall Mr. Miller also  
23 saying that there wasn't enough information to approve the  
24 settlement, although he wasn't going to object to it going  
25 forward as long as rights were reserved?

1 A Yeah. That rings a bell.

2 Q Okay. And do you recall Mr. Schiller here agreeing with  
3 that sentiment saying there was nothing about the settlement  
4 that inhibited anybody's rights to investigate further or bring  
5 claims?

6 A I don't know. I assume there's a transcript, though.

7 Q And -- I'm asking what your recollection was.

8 A I don't recall offhand sitting here now.

9 Q All right. But you did take note that the creditors'  
10 committee was asking for information about the sale transaction  
11 at the time, yes?

12 A I don't know that I'd say I took note of it, but, yes, I  
13 do have a recollection that that was the case.

14 Q Okay. Now, in the -- let me ask you to turn now to  
15 Exhibit 860. 860 is an e-mail from Mr. Davis, who represents  
16 Barclays, right?

17 A Yep.

18 Q To you dated December 19th, 2008. Do you recognize it to  
19 be a communication between you and Mr. Davis concerning the  
20 settlement?

21 A Yes, I see it. I see the e-mail. What is the question?

22 Q Do you recognize the document?

23 A Yes.

24 Q Okay.

25 MR. GAFFEY: Your Honor, I move in Exhibit M-860.

1 MR. SCHILLER: No objection.

2 THE COURT: It's admitted.

3 (Movant's Exhibit No. 860 was received.)

4 BY MR. GAFFEY:

5 Q Now, this is a -- if you read, take a look through here,  
6 the discussion in here concerns your attendance or not at the  
7 settlement hearing, right?

8 A Correct.

9 Q And it begins with Mr. Davis, Barclays' counsel, writing  
10 to you saying, quote, I think the current plan subject to  
11 seeing what the objections actually look like, is to have all  
12 the witnesses present, unfortunately, because of the sense that  
13 the judge doesn't like to be a rubber-stamp, and especially on  
14 short notice, would not be pleased if the declarant for a \$7  
15 billion motion didn't appear. We should discuss at four.

16 Do you see that?

17 A Yes.

18 Q Do you recall having a discussion on about the 19th of  
19 December with counsel for Barclays about planning, with regard  
20 to your attendance and potential testimony at the hearing?

21 A Yes. Because I recall that I was in Colorado. They were  
22 forecasting storms. I was worried I wasn't going to be able to  
23 make it, and I was -- certainly would've been happy not to have  
24 to appear, given that I was flying back for it, but I  
25 understood that the judge would likely want the declarants

1 there.

2 Q Okay. And the question I have about this is, again, I  
3 take note that it's only with Barclays' counsel you're having  
4 this discussion?

5 A And although I do recall also calling Steve Cutler and  
6 letting him know there was a chance I wasn't going to be there.

7 Q And in the final e-mail in the sequence, that is at the  
8 top of the first page, after you've discussed the storm and the  
9 potential travel issues and --

10 A Uh-huh.

11 Q -- Mr. Davis writes back, that's our thinking. It looks  
12 like creditors' committee at LBHI is putting in some sort of  
13 general objection on the entire Barclays' deal, about the  
14 entire Barclays' deal and wanting more time to investigate the  
15 whole deal. They plan to file an objection this afternoon.

16 Putting that aside, I think what we have in mind is just a  
17 short statement from the fed, after statements from the trustee  
18 and SIPC, just to the effect that the feds support the  
19 settlement, et cetera.

20 A Uh-huh.

21 Q So, so long as no one is taking issue with the facts  
22 underlying the declaration, it's hard to see any need to have  
23 you testify at all, but you never know if the judge may want to  
24 ask questions.

25 Do you see that?

1 A Yes, I do.

2 Q And did you have any similar conversations with other  
3 lawyers involved in the settlement, other than counsel for  
4 Barclays?

5 A I recall having a discussion with the trustee, with Jim  
6 Kobak from the trustee's counsel about my appearance and  
7 statement. As I recall, the idea was that if there was going  
8 to be testimony, Barclays was going to be putting me up as a  
9 witness, so that I believe was why Mr. Davis was putting in the  
10 statement about, you know, hard to see and need to have you  
11 testify, because they were the ones who were going to be  
12 putting me up.

13 Q And again, not to beat a dead horse, no conversation with  
14 LBHI?

15 A No.

16 Q All right. And I'd ask you to please turn to --

17 A I'm trying to remember if at some point prior to the  
18 hearing, I feel like there was a point where I did get a call  
19 from -- it might've been Mr. Miller asking some questions about  
20 the settlement, but it's a vague recollection.

21 Q Do you recall answering those questions?

22 A If they were asked, I'm sure I answered them. I'm just  
23 trying to remember whether he was going to call or whether he  
24 did, in fact, call, but I have a vague recollection of speaking  
25 to him at some point about this.

1 Q Okay. And as you're recalling that, are you recalling too  
2 Mr. Miller at the December 22nd settlement hearing saying that  
3 while he wouldn't support the transaction because there were  
4 additional questions that needed to be answered?

5 A I recall that there were issues raised about preserving  
6 rights, that I remember. I don't recall specifically what he  
7 said.

8 Q And now would you turn, please, to Exhibit 852.

9 Now, Exhibit 852 again begins with an e-mail between Mr.  
10 Davis at Cleary and you with copies to Lindsee Granfield and  
11 Jonathan Hughes.

12 Do you see that?

13 A Yes, I do.

14 Q And do you recognize this as an e-mail exchange between  
15 you and them, concerning the settlement motion?

16 A Yes.

17 MR. GAFFEY: And I offer Exhibit M-852, Your Honor.

18 MR. SCHILLER: No objection, Your Honor.

19 THE COURT: It's admitted.

20 (Movant's Exhibit No. 852 was received.)

21 BY MR. GAFFEY:

22 Q Now, further down within the e-mail, Ms. Granfield,  
23 there's an -- I beg your pardon, Ms. Leventhal. There's an e-  
24 mail from Ms. Granfield --

25 A Uh-huh.

1 Q -- to a group of people including Mr. Schiller, Mr.  
2 Caputo, Mr. Kiplok at Hughes Hubbard, others at Boies Schiller,  
3 et cetera.

4 Do you see that?

5 A Yes, I do.

6 Q And --

7 A And also Steve Cutler at J.P. Morgan.

8 Q I see that, yes, good point. And Wilton at Hughes  
9 Hubbard, right?

10 A Uh-huh. Yes.

11 Q Now, at this point, these are the proponents of the  
12 settlement motion.

13 A Correct.

14 Q And I want to ask you about what's in the second paragraph  
15 of that.

16 A Uh-huh.

17 Q Where it says, quote, we would also ask that the e-mail to  
18 the creditors' committee counsel state that the revised order  
19 addresses any concern about facts being binding for any issues  
20 other than the approval of the settlement and the authorization  
21 for the transfer of the settlement consideration to Barclays.

22 As to the creditors' committee, we think that the e-mail  
23 should go on to say that the settlement parties are not willing  
24 to agree to other demands of the creditors' committee, an order  
25 requiring delivery by January 15th of a vast amount of



1 information relating in general to the details of sale of  
2 assets to Barclays Capital, Inc. in September, as that  
3 information is irrelevant to the settlement under consideration  
4 on Monday, and such requests were made for the first time to  
5 the settlement parties on the afternoon of December 19th.

6 Nevertheless, the settlement parties are willing on an  
7 informal basis to discuss with the creditors' committee after  
8 the first of the year, reasonable requests for information  
9 concerning the sale, that it has sought from LBHI and been  
10 unable to obtain from LBHI.

11 Do you see that?

12 A Yes.

13 Q Okay. Does that -- do you recall discussions taking place  
14 about putting off until after the first of the year satisfying  
15 a request from the creditors' committee for information about  
16 the sale transaction?

17 A I was not a party to those discussions.

18 Q Well, you are a party to -- an e-mail was forwarded to you  
19 about it. Does that refresh your recollection as to whether  
20 you understood this to be the case at the time? The plan was  
21 to put the creditors' committee request for information off  
22 until after the first of the year?

23 A That's what the e-mail seems to say.

24 Q Finally, Ms. Leventhal, Mr. Schiller asked you yesterday  
25 whether it was consistent with the fed's view of the deal that

1 Barclays might have some sort of accounting gain after the deal  
2 was closed, and you gave him an answer along the lines of you  
3 thought Barclays expected to do well out of the transaction.

4 Do you recall that?

5 A What I said is that I assumed Barclays would expect to do  
6 well. They're a business, they wouldn't enter into a deal if  
7 they didn't think that they were going to come out of it in a  
8 good place for whatever reason that may be, whether it was an  
9 accounting gain or some other kind of gain.

10 Q At any point during those early days, we were talking  
11 about yesterday, the early days of the deal, --

12 A Uh-huh.

13 Q -- the Monday, the Tuesday, the Wednesday of the week  
14 after Lehman did that.

15 A Right.

16 Q Did it ever come to your attention, or did anybody ever  
17 say to you that the deal was structured in a way to ensure  
18 Barclays had a gain on the very first day?

19 A No.

20 MR. GAFFEY: Your Honor, I have nothing further for  
21 Ms. Leventhal. Thank you for your time.

22 THE COURT: Thank you.

23 MR. MAGUIRE: No questions, Your Honor.

24 MR. TECCE: No questions.

25 THE COURT: Redirect.

1 REDIRECT EXAMINATION

2 BY MR. SCHILLER:

3 Q Good morning, Ms. Leventhal.

4 A Good morning. What book would you like me to have?

5 Q For the moment, no book.

6 A Okay.

7 Q I would love -- like to begin on the issues of valuation,  
8 which as an attorney you resisted yesterday somewhat,  
9 particularly you recall counsel trying to press upon you  
10 agreement over market value in connection with repo  
11 collateral --

12 A Uh-huh.

13 Q -- and values assigned to it.

14 A Yes.

15 Q And with respect to that, do you recall that J.P. Morgan,  
16 during the settlement process, provided valuation information  
17 concerning the collateral that secured the fed as of September  
18 17th?

19 A Yes, I do.

20 Q That was the last evening that the fed provided financing.

21 A Yes.

22 Q And counsel asked you what the fed's view of the market  
23 value was of the 50.6 billion that was assigned to that  
24 collateral. And you said to counsel in response to his  
25 question, I'll read you his question:

1           So my question to you about the 50.6, at this point, the  
2           6th of October, it's still the fed's view -- that it's still  
3           the fed's view of the market value of the repo collateral in  
4           the fed repo, referring to the 50.6.

5           And you said in response, it is the view of the value we  
6           assigned to that collateral.

7           A     Uh-huh.

8           Q     And he went on and said, all right, market value? And you  
9           said, I'm not going to say market value or not, because that  
10          term has connotations in different context.

11          And then he said, well, what about pricing services, don't  
12          they determine market value? And you resisted again, and you  
13          said, my point is that the definition is different for  
14          different people.

15          A     Uh-huh.

16          Q     Now, one reason that you resisted agreeing that market  
17          value was ascribed to the 50.6, is that J.P. Morgan had told  
18          you and the trustee and Barclays, during the settlement  
19          process, that the pricing services for J.P. Morgan's marks on  
20          the 17th of September, the marks of the securities in the fed  
21          repo, were not reliable indicators of realizable value.

22          A     Correct.

23          Q     J.P. Morgan told you in substance that the collateral for  
24          many of the securities that made up the September 17th fed repo  
25          list were illiquid structured debt instruments, with assigned

1 overstated values, correct?

2 MR. GAFFEY: Your Honor, I haven't made many leading  
3 objections, but this is really leading.

4 THE COURT: Sustained, without prejudice to making  
5 further objections in the future if you're so moved.

6 THE WITNESS: I'm not sure about the last statement  
7 that you made. I don't recall that. I do recall that even our  
8 own markets people, when we were trying to analyze what  
9 securities Barclays had received versus what we had and the  
10 differences, pointed out that valuation --

11 THE COURT: How did that happen? I just sustained an  
12 objection and you're answering the question.

13 THE WITNESS: Oh, I'm sorry.

14 BY MR. SCHILLER:

15 Q Let me rephrase the question.

16 Do you recall your people internally looking at the J.P.  
17 Morgan --

18 THE WITNESS: Sorry about that.

19 Q -- values of the collateral as of the September 17th list?

20 A Yes, I do recall that.

21 Q And could you tell the Court what you learned from them?

22 A Well, I recall that they -- when we were trying to do this  
23 analysis that I had talked about of what collateral we had on  
24 the 17th versus what Barclays had received on the night of the  
25 18th, and we were looking, I recall that Jeff Moore, among

1 others, commented that valuations at that point in time, given  
2 the turbulent state of the market, were a very inexact science,  
3 and it was very difficult to actually ascribe values to some of  
4 these securities because they were illiquid.

5 And I recall also that that was made the analysis of what  
6 Barclays had received versus what we had particularly  
7 difficult.

8 Q Right. And Jeff Moore had done a comparison, did he, of  
9 what Barclays had received versus what was on that list on the  
10 17th?

11 A He tried to. I'm not sure we ever were able to  
12 successfully do that comparison, because there was a lot of  
13 question at that point in time as to what Barclays had actually  
14 received.

15 Q But it was clear they had received different securities  
16 than what was on your list?

17 A We knew that there were different securities, yes, than  
18 what we had had on the night of the 17th.

19 Q And he was sensitive to evaluating the valuation  
20 differences in those securities?

21 A He was sensitive to looking at, yes, what the differences  
22 would be between the securities, but acknowledged that it would  
23 be very difficult to value some of them in that particular  
24 market time period.

25 Q Now, in terms of J.P. Morgan's communications, its

1 admission, if you will, that its marks for the September 17th  
2 collateral were not reliable, let me ask you to look at M-640  
3 of Movant's Trial Exhibit.

4 MR. SCHILLER: Which is admitted, Judge.

5 THE WITNESS: Is it -- which binder is it in?

6 Q Oh, we're going to hand it up.

7 A Okay. That'll make life a little easier.

8 THE COURT: Thank you.

9 Q Now, you see this is from Hal Novikoff, who was  
10 participating on behalf of J.P. Morgan in this settlement  
11 effort; is that right?

12 A That's my understanding, yes.

13 Q And the date is October 31st, and the trustee, Mr.  
14 Giddens, is copied on this --

15 A Correct.

16 Q -- as are you.

17 A Uh-huh.

18 Q No, you're not copied on this.

19 A No, I'm not.

20 Q As is Mr. Kobak. And in the first two sentences, Mr.  
21 Novak (sic) reports, I've attached the spreadsheet with quote,  
22 collateral values, as of September 17th, which was the last  
23 evening on which the fed provided financing. Quote, I  
24 understand that these collateral values referred us principally  
25 by third party pricing sources, and we caution against using

1 those values as reliable indicators of realizable value, close  
2 quote.

3 Do you recall learning that information in the course of  
4 your settlement efforts?

5 A I recall hearing very similar things from our markets  
6 people, and I don't recall specifically hearing it from Chase's  
7 counsel, but I do recall hearing it from our markets people  
8 who, in turn, had been in touch with Chase as our collateral  
9 agent.

10 Q And do you recall Chase cautioning the trustee and  
11 Barclays and the fed against relying on its September 17th  
12 marks of what was in -- what securities were in the fed  
13 collateral?

14 A I'm sorry. Would you say that again?

15 Q Certainly. Do you recall being cautioned by J.P. Morgan  
16 as to the reliability of its marks for the September 17th  
17 securities that were part of the fed repo?

18 A I was not cautioned to that effect. I do recall again  
19 when our markets people were doing their analysis, that they  
20 were in touch with J.P. Morgan as our collateral agent, and  
21 they reported back to me that there was concern about the  
22 reliability of the marks.

23 Q Let me ask you to look at 641, Movant's 641.

24 MR. SCHILLER: Which is also admitted, Judge, and  
25 we're handing that out.



1 Q This is another e-mail from Mr. Novikoff dated November  
2 3rd in this settlement effort. And in the second full  
3 paragraph he says, quote, please note that the collateral value  
4 was obtained from third party pricing sources, and J.P. Morgan  
5 cautions that collateral value may not be a reliable indicator  
6 of realizable value, close quote.

7 Do you recall hearing that information from your  
8 evaluation people?

9 A Yeah, that's the same idea of what I was told by our  
10 markets people and not --

11 Q And by --

12 A -- by J.P. Morgan Chase.

13 Q And by realizable value, does that mean to you what a  
14 willing buyer will buy from a willing seller, the realizable  
15 value upon sale in the market?

16 MR. GAFFEY: Objection, leading.

17 THE COURT: Sustained.

18 BY MR. SCHILLER:

19 Q What is your understanding of realizable value as Mr.  
20 Novikoff uses it there?

21 A You know, not being a markets person but my understanding  
22 as a lawyer is that it's the value you can get if you have to  
23 sell something.

24 Q Now, yesterday you were asked about Movant's Exhibit 701.

25 MR. SCHILLER: If I can just put the first page of it

1 up on the screen.

2 Q It is in the big book.

3 A Yep, I got it.

4 Q And you'll see on this 1.1 ratio business, in the second  
5 sentence it says, the hold up at the moment is that Jeff is  
6 matching the types of collateral that you received, referring  
7 to Barclays, overall to what we had on 9/17 to determine  
8 whether the quality matches up or not.

9 Do you see that?

10 A Yes, I do.

11 Q That's the second sentence there. And Jeff is Jeff Moore?

12 A Correct.

13 Q And he was trying to determine whether the quality was  
14 matching up.

15 A That's correct.

16 Q And at page 0098, five pages in, there is a memo that was  
17 provided to you from Mr. Hughes that offers two principles from  
18 Stephen King, a Barclays' trader, as to the values being quote,  
19 worse.

20 If you look at principle two at page 0098, Stephen King  
21 writes, given the quality of the collateral being delivered is  
22 worse than the average of the pool, the fed facility haircut  
23 ratio should be applied to that collateral.

24 Do you see that?

25 A Yes, I do.

1 Q And he's saying there in substance that the market pricing  
2 is worse, the value is worse than the average of the pool,  
3 correct?

4 A That's what I interpret that to mean, yes.

5 Q Now, these pool services that were referenced in the  
6 questions you were asked yesterday --

7 A You mean pricing services?

8 Q Yes, exactly, pricing services, thank you.

9 These pricing services are available to any institution  
10 that wants their use, right?

11 A That's my understanding.

12 MR. GAFFEY: Your Honor, objection. Could I have a  
13 reference to the transcript where I used the word pricing  
14 services in a question?

15 THE COURT: That's a fair inquiry.

16 MR. SCHILLER: The definition Mr. Gaffey asked, the  
17 definition refers to market value being determined as made  
18 available to bank by a recognized pricing service, which uses  
19 -- which the bank uses for pricing security -- that's a  
20 question. Answer, correct.

21 MR. GAFFEY: I just wanted the page number.

22 THE COURT: The page number?

23 MR. SCHILLER: 65161.17.

24 BY MR. SCHILLER:

25 Q Now, these pricing services which J.P. Morgan apparently

1 used to price the federal collateral, that J.P. Morgan has  
2 written here and the Court and you have now seen was  
3 unreliable, according to their e-mail that we looked at, M-4640  
4 a moment ago, right?

5 A There -- my recollection again, I can't speak for what  
6 J.P. Morgan put in those e-mails, I wasn't copied on them. My  
7 understanding from our markets people was that there was  
8 concern, not necessarily than that the pricing services were  
9 unreliable, but that given the market situation, the pricing  
10 services values may not have necessarily reflected what could  
11 be obtained in the market at that time.

12 Q And pricing services, were they available to the credit  
13 committee -- creditors' committee and their financial advisors  
14 in September 2008?

15 MR. GAFFEY: Objection, foundation.

16 THE COURT: Sustained.

17 BY MR. SCHILLER:

18 Q The creditors' committee had the opportunity to review the  
19 schedules of the collateral that Barclays had received --

20 THE COURT: Well, this witness has absolutely nothing  
21 to do with the creditors' committee. It's going to be very  
22 difficult for you to lay a foundation that makes any series of  
23 questions to this witness about what the creditors' committee  
24 knew or could've known appropriate questions. So any objection  
25 like that, I will sustain.

1 MR. SCHILLER: Okay. Thank you, Judge.

2 THE COURT: Don't go there.

3 MR. SCHILLER: I will have one series of questions  
4 when it comes to the December hearing I'd like you to consider.

5 THE COURT: You're free to ask any questions you like  
6 that are proper.

7 BY MR. SCHILLER:

8 Q You were asked some questions yesterday about testimony  
9 before the financial crisis inquiry committee by Mr. Baxter and  
10 by Mr. Miller, and I believe their statements to the committee  
11 that were admitted into evidence. Do you recall that?

12 A Yes, I do.

13 Q And you were also asked about J.P. Morgan's chief risk  
14 officer, Mr. Zubrow. Do you recall that?

15 A Barry Zubrow, yes.

16 Q And was Mr. Zubrow also present and providing testimony at  
17 the hearings last week in Washington?

18 A Yes, he was.

19 Q And did you review generally his statement of September  
20 1st, 2010 to the Commission?

21 A September -- yes, I did. Sorry.

22 Q Can I ask you to turn to tab 11 in the book that we've  
23 provided.

24 A Okay. I've got to get rid of this one first.

25 MR. SCHILLER: And that's BCI Exhibit 974, Your Honor.

1 THE WITNESS: What tab did you say, I'm sorry?

2 Q 11.

3 A Okay. Thank you.

4 Q The written statement of Barry Zubrow before the Financial  
5 Crisis Inquiry Commission.

6 A I have it.

7 Q And did you review this last week?

8 A Yes, I did.

9 MR. SCHILLER: I move Mr. Zubrow's statement into  
10 evidence

11 MR. GAFFEY: No objection, Your Honor.

12 THE COURT: It's admitted.

13 (BCI's Exhibit No. 974 was received.)

14 BY MR. SCHILLER:

15 Q J.P. Morgan provided, I believe you testified yesterday,  
16 intra-day financing to LBI before LBI was put into SIPA  
17 liquidation; is that correct?

18 A Yes, it is.

19 Q Now, if you look at page 3 of Mr. Zubrow's statement to  
20 the commission, going over to page 4, I'm going to pick a  
21 couple of sentences in that last paragraph to read aloud.

22 Quote, J.P. Morgan, unlike any single triparty investor,  
23 took on a broker dealer's entire triparty repo book each day.  
24 That meant it would face far greater risks in a liquidation  
25 scenario, close quote.

1 Do you see that sentence?

2 A Yes, I do.

3 Q And then at the bottom, moreover, the head quote --  
4 moreover, the haircuts negotiated between investors and broker  
5 dealers did not, in many cases, fully reflect the liquidation  
6 risk for the increasingly large amount of structured difficult  
7 to value securities that were being financed by the triparty  
8 repo program, close quote.

9 Do you see that?

10 A Yes, I do.

11 Q Now, as a general matter, at that time in September 2008,  
12 was the collateral used by LBJ to secure the intra-day funding  
13 by J.P. Morgan also to a large extent used to secure the fed  
14 repo overnight funding?

15 A You mean LBI?

16 Q I do mean LBI. Let me ask it again.

17 As a general matter, was the collateral used by LBI to  
18 secure intra-day funding also, to a large extent used to secure  
19 overnight repo funding by the fed?

20 A That's my understanding, but I should qualify that by  
21 saying I did not review the collateral portfolios to that  
22 degree, nor do I know exactly what J.P. Morgan was using to  
23 secure itself intra-day, so that's my understanding, but I'm  
24 not sure it's correct.

25 Q Let me turn your attention to page 5 where Mr. Zubrow

1 states in the middle of the first full paragraph. Quote --  
2 referring to late August and early September 2008.

3 Quote, in addition, it came to light that many of the  
4 securities Lehman had pledged to J.P. Morgan in June were  
5 illiquid structured debt instruments, and that appeared to have  
6 been assigned overstated values, close quote.

7 Do you see that?

8 A Yes, I do.

9 Q And did your operations people discuss with you that  
10 concern by J.P. Morgan in September?

11 A No. Again, my recollection is that the schedules were the  
12 collateral -- I'm sorry, rather the securities that had been  
13 valued in connection with the fed's repo on the 17th whether  
14 those valuations were reliable from a standpoint of realizable  
15 market value, what you could sell them for if you use the way  
16 I've defined realizable. I recall those discussions, but I do  
17 not recall whether there was something that they were  
18 overstated in value. I think it was more a question of how you  
19 would value these.

20 Q In terms of the how to value, meaning the difficulty in  
21 valuing?

22 A Yes.

23 Q Let me ask you to look at page 7 of Barry Zubrow's --

24 A Uh-huh.

25 Q -- testimony last week at the top of the page.



1 Quote, J.P. Morgan meanwhile continued to evaluate its  
2 margin positions with respect to Lehman. Its daily margin  
3 requirements for triparty repo clearance were rising as Lehman  
4 was increasing the amount of illiquid securities in its  
5 triparty repo book.

6 During the second week of September 2008, J.P. Morgan  
7 analysts conducted a broad review of Lehman's collateral  
8 securities. This review indicated that some of the largest  
9 pieces of collateral pledged to J.P. Morgan were illiquid,  
10 could not reasonably be valued, and were supported largely by  
11 Lehman's own credit. This was inappropriate collateral,  
12 essentially claims against Lehman pledged to secure other  
13 claims against Lehman.

14 When the true nature of Lehman's collateral came to light  
15 on September 11th, 2008, it became apparent that J.P. Morgan  
16 was holding a substantial amount of inappropriate collateral,  
17 and that it would need additional collateral if it were to  
18 continue supporting Lehman.

19 Was the fed informed at that time of this reason, a  
20 substantial amount of inappropriate collateral for JPM's  
21 request of Lehman for five billion dollars additional  
22 collateral?

23 A I was not informed of that.

24 Q You were asked a number of questions yesterday, as I  
25 suggested earlier, about the value of securities that were

1 transferred to Barclays.

2 At the time of the sale, was the fed aware that market  
3 conditions contributed to uncertainty concerning the value of  
4 certain categories of securities in the sale?

5 A I can't speak for in the sale, but clearly we were aware  
6 that there were market conditions that were contributing to  
7 uncertainty.

8 Q Uncertainty in the values of securities at that time?

9 A Generally, yes.

10 Q And was that especially true of mortgage backed securities  
11 and structured securities?

12 A There were liquidity issues with those securities, yes.

13 Q And was that uncertainty concerning the value of certain  
14 securities -- let me withdraw that question.

15 With regard to the value of the repo securities at the  
16 time that were taken by the fed, did the fed independently  
17 value that collateral, or did it rely on J.P. Morgan to assign  
18 values?

19 A J.P. Morgan Chase acts as the fed's collateral agent. My  
20 understanding is that they do all of the valuation for the  
21 collateral that we take -- that we took into the PDCF.

22 Q You were asked yesterday questions concerning the fed's  
23 risk in connection with Barclays taking out the fed's exposure  
24 by stepping into the shoes. And you were asked by Mr. Gaffey  
25 about two different kinds of risk that the fed faced in

1 providing repo financing.

2 First, you were asked about credit risk associated with a  
3 particular borrower. Do you remember that?

4 A Counter \*\*(indiscernible - 01:14:29) credit  
5 (indiscernible), yes.

6 Q And then you were separately asked about market risk,  
7 quote, a downward slide in the value of the underlying  
8 collateral. Do you remember that?

9 A Yes, I do.

10 Q And then you agreed with Mr. Gaffey that the  
11 creditworthiness of the borrower had no bearing on the market  
12 risk that he alluded to. Do you remember that?

13 A In certain circumstances, that's correct.

14 Q But I take it that you meant there, for the Court, that a  
15 borrower's creditworthiness does not impact the market value of  
16 the securities that the borrower pledges?

17 A Right.

18 Q And if the value of the fed collateral turns out not to be  
19 worth the marks that were on it, then Barclays gets stuck and  
20 must make up the difference, correct?

21 A I'm sorry, I don't understand your question.

22 Q If the value of the securities turns out -- the market  
23 value, the actual value, the realizable value, turns out to be  
24 not worth what the marks are on that collateral, then Barclays  
25 gets stuck with making up the difference to the fed, correct?

1 A Under what circumstances? I don't understand the  
2 hypothetical.

3 Q Well, there's a market risk of a downward slide in the  
4 value of the underlining collateral, right?

5 A Are you talking about when Barclays pledged collateral to  
6 the PDCF?

7 Q Yes.

8 A Okay.

9 Q That's what I'm talking about.

10 A Uh-huh.

11 Q And I'm talking about the fed's risk in that respect.

12 A Yes.

13 Q And the risk is only if Barclays were to default on its  
14 repayment obligation.

15 A Correct.

16 Q Because Barclays was creditworthy and did repay the loan,  
17 the fed had no realistic exposure.

18 MR. GAFFEY: Objection.

19 THE COURT: The objection is because Barclays was  
20 creditworthy? We know they were.

21 MR. GAFFEY: I didn't hear Your Honor, I'm sorry?

22 THE COURT: I'm sorry. Barclays was creditworthy.

23 MR. GAFFEY: The objection is to its leading and I'm  
24 not sure that the witness has the knowledge necessary to  
25 pronounce on Barclays' creditworthiness.

1 THE COURT: Well, I'm confident she doesn't have --

2 THE WITNESS: I was going to say.

3 THE COURT: -- the ability to do that.

4 MR. SCHILLER: I withdraw the question, Judge.

5 BY MR. SCHILLER:

6 Q Yesterday, you were asked about paragraph 13 of the  
7 clarification letter and paragraph 20 of your declaration.

8 MR. SCHILLER: Can we put them up side-by-side on the  
9 screen? Paragraph 13, side-by-side with declaration paragraph  
10 20.

11 Q On your cross-examination, you were shown paragraph 13 and  
12 paragraph 20, and you were asked if you knew anything about an  
13 inadvertent termination notice by Barclays in connection with  
14 the forty-five billion dollars repo.

15 Do you remember generally the questions about the  
16 inadvertent termination?

17 A Yes, I do remember those.

18 Q And if you look at paragraph 13 of the clarification  
19 letter, apart from any inadvertent termination, that provision  
20 also effects a termination of the repo as part of the sales  
21 transaction, as you read that provision?

22 A I'm sorry. I don't understand your question.

23 Q The provision itself --

24 A Yes.

25 Q -- provides for termination of the repo as part of the

1 sale transaction, correct?

2 A That's how I read it, yes.

3 Q And when you refer to this part of the clarification  
4 letter in paragraph 20 of your declaration, --

5 A Yes.

6 Q -- is that what you're referring to?

7 A Yes.

8 Q You were shown M-848, an e-mail exchanges during the  
9 settlement process. And I can do this without you looking at  
10 it, I think, to save time.

11 A Okay. Well, I can't read the document.

12 Q And it was an exchange with Mr. Hughes, and in terms of  
13 edits to the declaration that Mr. Hughes proposed --

14 A Uh-huh.

15 Q -- do you recall whether he said to you, in the course of  
16 your conversations that he was proposing certain edits to  
17 address concerns raised by the trustee?

18 A Honestly, sitting here I don't recall that, but it's  
19 possible.

20 Q In terms of the secrecy or confidentiality of the  
21 settlement negotiations, was there sensitivity on the part of  
22 both Barclays and J.P. Morgan about the confidentiality of this  
23 problem until they could get it resolved before His Honor?

24 A Oh, absolutely, yes.

25 Q And was Harvey Miller and his client given a full

1 opportunity to consider the motion and comment on it in court?

2 A I'm not sure I'm capable of answering that, but it seems  
3 that way.

4 Q Okay.

5 MR. SCHILLER: That concludes our examination. Happy  
6 New Year and thank you, Ms. Leventhal.

7 THE WITNESS: Thank you.

8 MR. GAFFEY: A little recross, Your Honor.

9 THE COURT: Sure. I'm just going to note that I have  
10 about five minutes before I --

11 MR. GAFFEY: I should be done by then, Your Honor.

12 THE COURT: Okay.

13 MR. GAFFEY: Just very briefly.

14 RECROSS-EXAMINATION

15 BY MR. GAFFEY:

16 Q Ms. Leventhal, would you -- do you have your declaration  
17 there? If not, take a look behind --

18 A Yeah, no, I have it.

19 Q You have 119-A.

20 A Yep, I have it.

21 Q Okay. And again, go to paragraph 9 of your declaration.  
22 This is the final that was submitted in connection with the  
23 settlement agreement.

24 A Yes.

25 Q All right. And you refer there, and we talked about this

1 a bit yesterday. In total, the New York Fed has funded LBI  
2 46.22 billion in cash and Treasury securities against the 56.2  
3 billion in collateral.

4 A Correct.

5 Q Was there a reason at the time you didn't say anything in  
6 your declaration to the Court about market volatility making it  
7 difficult to put that market valuation on the collateral?

8 A Because those were the values that we assigned to the  
9 securities.

10 Q And Mr. Schiller asked you about how difficult that was  
11 and what doubts there might be and about market volatility. My  
12 question is, do you recall --

13 A No, I did not put it in my --

14 Q -- any draft of your declaration where --

15 A No.

16 Q -- it was considered to qualify that number at all when it  
17 was put to the Court?

18 A No. Because those were the values the fed assigned the  
19 collateral when we had them.

20 Q Okay. And if you could take a look, too, at -- why don't  
21 you turn to tab 119-B, that's a separated out copy of Mr.  
22 Moore's declaration which is also within 119 --

23 A Wait. I'm in the wrong book, hold on.

24 Q -- the entire settlement motion.

25 A Yes.



1 Q Okay. And take a look at Mr. Moore's -- now, Mr. Moore is  
2 the valuation guy at the fed, right?

3 A Yeah. He's the specialist in our markets group, yes.

4 Q Okay. Take a look at paragraph 4 of Mr. Moore's  
5 declaration.

6 A Uh-huh.

7 Q And Mr. Moore says, as you did, in paragraph 4, on the  
8 night of September 17th, the New York Fed valued the fed  
9 securities at 50.62.

10 A Correct.

11 Q When you were reviewing these papers for their filing, did  
12 you consider putting in a qualification about how difficult or  
13 volatile markets made it impossible to come to a market  
14 valuation?

15 A No.

16 MR. GAFFEY: Okay. I have nothing further, Your  
17 Honor.

18 THE COURT: Anything more, Mr. Schiller?

19 FURTHER REDIRECT EXAMINATION

20 BY MR. SCHILLER:

21 Q Just to note, Ms. Leventhal, that at the hearing  
22 transcript December 22nd, 2008 at page 32, see if this  
23 refreshes your recollection, at lines 22 through 24, Mr.  
24 Miller's addressing the Court --

25 MR. GAFFEY: Objection, Your Honor. The witness has

1 expressed no failure of recollection.

2 THE COURT: I'm not sure this is about refreshing  
3 recollection, as much as it's a preface to a question, but I  
4 don't know. What is it?

5 MR. SCHILLER: It's a preface to a question.

6 THE COURT: In that case, let's hear what the question  
7 is, and then we can reserve further objections.

8 BY MR. SCHILLER:

9 Q Do you recall whether Mr. Miller and his colleagues spent  
10 a considerable amount of time with the SIPC trustee, with the  
11 staff, and with the former Lehman people in going through the  
12 facts relating to the settlement transaction?

13 A I --

14 MR. GAFFEY: Objection, foundation.

15 THE COURT: I'm going to sustain the objection. It's  
16 not clear to me what it is about the very limited questioning  
17 of Mr. Gaffey that leads to this line of inquiry concerning the  
18 witness' recollection of conversations that took place with  
19 other parties in interest, but --

20 MR. SCHILLER: Sure.

21 THE COURT: But I'm not raising it -- I'm not raising  
22 the objection, it's just not clear what path we're going down  
23 right now.

24 MR. SCHILLER: It's a limited path to show that Mr.  
25 Gaffey's suggestion that LBHI was shut out isn't accurate, and

1 that Mr. Miller reported to this Court in the presence of Ms.  
2 Leventhal that they'd spent considerable time on this motion  
3 before Your Honor decided it.

4 MR. GAFFEY: Well then my objection is beyond the  
5 scope of my recross, Your Honor.

6 THE COURT: Well, that's what I think it is, too. So  
7 to the extent that you're now going to object that it's beyond  
8 the scope of the recross, that objection is sustained. He  
9 didn't raise that issue just now.

10 MR. SCHILLER: Thank you, Judge.

11 THE COURT: Okay. I actually have a question for the  
12 witness, and if it opens up further questioning, so be it.

13 EXAMINATION

14 BY THE COURT:

15 Q One of the things that has been bothering me is the timing  
16 of the take-out prior to the sale hearing. And in looking at  
17 BCI Exhibit 4, which you were shown yesterday and it's at tab  
18 three of Mr. Schiller's book.

19 A That's the agreement, right, the --

20 Q And I'm sure you're familiar with the document.

21 A Hold on. Let me just --

22 Q Paragraph 2 -- but let me give you time to find it.

23 A Thank you. Okay. Yes.

24 Q Paragraph 2 includes a defined term, the take-out date.

25 And the take-out date is a date that isn't any later than the

1 opening of business on Monday, September 22, or it could be  
2 even a later date if the sale hearing is postponed.

3 A Correct.

4 Q Do you know how it came about that the take-out occurred  
5 prior to the sale hearing, instead of after the sale hearing?

6 A Yes. Because as I recall, while we were negotiating this,  
7 Barclays was indicating to us, and I believe that's the  
8 paragraphs 3 and 4 essentially refer to this, as of the date  
9 Barclays has extended 10.5 billion of credit to LBI, Barclays  
10 intends to and will use its commercially reasonable efforts to  
11 make or arrange, that paragraph.

12 My recollection was that in the course of negotiations,  
13 one of the things Barclays said is that if they could, their  
14 goal was to essentially take over financing LBI as quickly as  
15 possible, once it was clear that they were, you know, likely to  
16 succeed in their bid.

17 Now, obviously they didn't know whether the Court would  
18 approve the sale, but there were no other bidders. They were  
19 it. So they were prepared to move forward on the notion of  
20 taking out over financing LBI in anticipation that they were  
21 going to then close on this deal, and my understanding is they  
22 begin that process earlier in the week and continued over the  
23 course of the week to effect that, and the agreement was  
24 designed to allow them the options of either novating, taking  
25 us out different ways or just taking over the financing, and

1 that's what they, in fact, did.

2 Q Okay. And did the fed say or do anything in its dealings  
3 with Barclays that week --

4 A Uh-huh.

5 Q -- to encourage an earlier take-out date?

6 A No.

7 Q Okay.

8 A We just wanted to make sure that when the deal was done,  
9 we were no longer in the position of financing LBI, because it  
10 didn't make sense to us that we would be facilitating an  
11 acquisition, and it seemed right that the purchaser should be  
12 the one financing LBI, and that's why there's -- this whole  
13 line of questions on quid pro quo had me somewhat confused,  
14 because as the person who was sitting there negotiating this,  
15 in my mind, our view was, there would be a problem with this  
16 deal if Barclays had said to us, we're not going to finance  
17 LBI, but we are the purchaser, because then at a certain point,  
18 we would've had exactly the chaos we were trying to avoid.

19 But on the other hand, in terms of needing to say we will  
20 support this deal, you know, only if you do this, that wasn't  
21 what was in my head. What was in my head was, we're not going  
22 to finance something to make it easier for you to acquire it.  
23 We're financing for -- we were financing with the purpose of  
24 avoiding a disorderly unwind.

25 Q And what would have happened in your mind if the sale to

1 Barclays had not been approved during the early morning hours  
2 of September 20th and Barclays was then in a position of having  
3 financed an acquisition that was not approved?

4 A Well, remember, at that point, there would've been a  
5 problem because Barclays, you know, would've been financing  
6 overnight. The assumption would've been then that the Chase  
7 would have had a take-out on Monday morning, they would've had  
8 an unwind and finance intra-day. Chase wouldn't have been  
9 prepared to do that if the fed wasn't going to step back in and  
10 finance. If Barclays hadn't been approved as the buyer, we  
11 would've had to have go back to the plan of an orderly unwind,  
12 and we would've probably, I mean, and I can't make the decision  
13 what the powers that be would've decided, but I think there  
14 would've been a discussion as to whether the fed should step  
15 back in to finance overnight, so that Chase would unwind in the  
16 morning on Monday.

17 Q And were there any discussions about that plan B, if we  
18 can call it that, approach to financing LBI around the time of  
19 the drafting and execution of the document we've just been  
20 referring to, this September 17th letter agreement?

21 A Discussions with Barclays?

22 Q Yes.

23 A No. Not -- no, I don't believe we ever had those  
24 discussions.

25 THE COURT: All right. Those are my questions. If

1 that prompts any further questions, go right ahead.

2 MR. SCHILLER: Not on our part, Judge, thank you.

3 MR. GAFFEY: None from me, Your Honor.

4 THE COURT: Okay. We're going to -- you're excused.

5 Thank you.

6 THE WITNESS: Thank you.

7 THE COURT: I'm late for my call. We'll resume at  
8 11:45 or so.

9 MR. SCHILLER: Thank you, Judge.

10 (Recessed at 11:06 a.m.; reconvened at 11:51 a.m.)

11 THE COURT: Be seated, please. It's time for Kenneth  
12 Raisler.

13 MR. HUME: Yes. Good morning, Judge Peck.

14 THE COURT: Good morning.

15 MR. HUME: We're -- our next witness is Ken Raisler.  
16 He's a partner at Sullivan and Cromwell, and was involved in  
17 work related to the exchange traded derivatives and margin.

18 THE COURT: Mr. Raisler, please raise your right hand.

19 KENNETH RAISLER, WITNESS, SWORN

20 THE COURT: Be seated, please.

21 DIRECT EXAMINATION

22 BY MR. HUME:

23 Q Good morning, Mr. Raisler.

24 A Good morning.

25 Q Could you state for the record what your position is at

1 Sullivan and Cromwell?

2 A I'm a partner at Sullivan and Cromwell in the New York  
3 office.

4 Q And what is your background prior to your time at Sullivan  
5 and Cromwell?

6 A I had clerked in the Southern District of New York, and  
7 after that, I went to the U.S. Attorney's office in Washington,  
8 D.C. for five years, practiced in the criminal and civil  
9 divisions there. And then from there, I went to the Commodity  
10 Futures Trading commission, CFTC, from 1982 to '87.

11 I joined the CFTC as deputy general counsel in charge of  
12 their litigation program, and after a year I was made the  
13 general counsel, so I served there as general counsel.

14 After leaving the CFTC, I began in private practice,  
15 basically in the area of commodities futures and derivatives.  
16 It's a practice group at Sullivan and Cromwell, which I head,  
17 and I've been in that position for a number of years since  
18 then.

19 Q And other than the work you just described, have you -- do  
20 you have any other involvement in the area of exchange traded  
21 derivatives?

22 A I have been on the board of an industry trade associates,  
23 the Futures Industry Association, so-called FIA, which  
24 represents the market participants, and to some extent, the  
25 brokers and other users of the exchange. I've been on the



1 board for the last eighteen years, and I've been involved as  
2 well through bar association work, including the city bar,  
3 where I headed the -- their committee on futures regulation  
4 some years ago, and the ABA, where I'm vice-chair of that  
5 committee, also looking at derivatives and exchange traded  
6 products.

7 Q And for how long have you been the head of Sullivan and  
8 Cromwell's commodities, futures and derivatives group?

9 A Since I joined Sullivan Cromwell, basically eighteen years  
10 ago.

11 Q During the week of September 15th, 2008, what involvement  
12 did you have in the Barclays' acquisition of Lehman's North  
13 American business?

14 A If I can answer this at the high level. Sullivan Cromwell  
15 was instructed and I was instructed to work with Barclays and  
16 Lehman to facilitate a transfer of all of the proprietary and  
17 customer accounts, margin, and collateral from Lehman to  
18 Barclays. And that involved, among other things, working to  
19 find out what was there at Lehman, so we knew what was needed  
20 to be moved, and also working with the exchanges and the  
21 regulators to facilitate that movement.

22 Q How did your involvement in the transaction begin?

23 A On Sunday, the 14th, I received a call from some of the  
24 folks at Barclays and was asked to appear at a meeting to start  
25 on Monday morning. My best recollection is Monday morning we

1 first met over at Barclays and then we went over to Lehman.

2 So it really was -- started Sunday sometime in the  
3 afternoon, but the real work began Monday morning.

4 Q And was that meeting precipitated by calls from the  
5 Chicago Mercantile Exchange?

6 A Yes. My understanding was that CME, having heard about  
7 the Lehman parent bankruptcy, had issues about insecurity with  
8 respect to Lehman, in terms of its broker dealer and FCM, FCM  
9 being their Futures Commission Merchant, which is the  
10 equivalent of a broker dealer for the trading of futures  
11 contracts.

12 And the CME wished to facilitate an orderly movement of  
13 the positions and the accounts and the collateral from Lehman  
14 to a secure broker who could handle those positions.

15 When that call came in on Sunday, it was really just that  
16 transaction that was in front of us, and we met on Monday  
17 morning, it was for purposes of moving the positions to a safer  
18 location at Barclays and at least exploring that opportunity.

19 Q And did you understand why the CME had this, what you call  
20 insecurity?

21 A I spoke to the CME starting Monday, I didn't know  
22 precisely on Sunday what their insecurity was. I had a better  
23 idea when I spoke to them on Monday, but certainly based on  
24 experience in light of a bankruptcy filing of a parent, the  
25 ability of the sub, in this case, the FCM broker dealer to meet

1 its responsibilities, would be in doubt. And given the turmoil  
2 in the market that week combined with that bankruptcy, the  
3 responsibility of the exchange in this case, the CME, other  
4 exchanges I'm sure we'll have a chance to talk about as well,  
5 was to make sure that the market continued to operate smoothly,  
6 and that there were no defaults.

7 And so their goal, from the very start, would be to look  
8 to find a safe home for an entity that might otherwise be in  
9 trouble or might not be able to perform.

10 Q Did you come to learn on Monday, September 15th that there  
11 was a larger transaction involving Barclays' acquisition of the  
12 entire Lehman business?

13 A Yes. Sometime in the afternoon on Monday. We started  
14 meeting relatively early on Monday morning to discuss the  
15 transfer, as a separate transaction. In the afternoon on  
16 Monday, we heard word about and actually others of my partners  
17 at Sullivan and Cromwell were working on negotiating an asset  
18 purchase agreement that would involve the transfer of a broader  
19 range of businesses, not just the futures accounts as I've  
20 described them.

21 Q Did that, learning of the larger transaction change in any  
22 way what you were doing?

23 A It did not. My responsibilities and what I was to  
24 accomplish were, from my point of view, identical. It was  
25 basically to facilitate that movement and to make sure that all

1 the necessary commissions were achieved.

2 Q Did you have meetings with people at Lehman who were  
3 involved in the exchange traded derivatives business?

4 A Yes. Starting sometime Monday morning, we gathered in a  
5 conference room at Lehman. I don't precisely remember all of  
6 the people who attended, but two of the people on the Lehman  
7 side were Jeff Jennings, who ran their futures -- their global  
8 futures business, and a gentleman by the name of Ron Filler,  
9 who was then a consultant to Lehman, but Ron had run the  
10 futures business for a number of years, probably more than a  
11 decade, up until May of 2008.

12 Q In those meetings, was it your understanding that all of  
13 the margin or collateral pledged to secure exchange traded  
14 derivatives would be transferred to Barclays?

15 MR. MAGUIRE: Objection. Leading, Your Honor.

16 Q Was it your -- what was your understanding --

17 THE COURT: By the way, I'm sustaining --

18 Q -- with respect to margin?

19 THE COURT: -- the objection so it's clear and we can  
20 -- now that he has a leading question in his mind, you can ask  
21 him a general one.

22 Q What was your general understanding with respect to --

23 A My understanding from starting on Sunday through the week  
24 never changed. Which was that there was to be effectuated a  
25 transfer of the accounts that were at Lehman. That would

1 include the house accounts, so-called proprietary business, and  
2 the customer accounts. And when we talk about account, it's  
3 everything that's in the account, which would be all of the  
4 positions and all of the collateral.

5 So there was never a discussion that deviated from that.  
6 That would be what the exchanges would expect. That would be  
7 what the CFTC would expect, and that frankly, would be what I  
8 would expect, because that's in history what -- the way it's  
9 always happened.

10 Q Have you been involved -- prior to this transaction, had  
11 you been involved in other transactions in which exchange  
12 traded derivatives business had been transferred from one  
13 broker to another?

14 MR. MAGUIRE: Objection, Your Honor.

15 THE COURT: What's the objection?

16 MR. MAGUIRE: This witness was not identified as an  
17 expert, and therefore, any specialized knowledge or anything  
18 beyond his factual knowledge in connection with this  
19 transaction I don't believe is properly presented by this  
20 witness.

21 THE COURT: Well, I think the only thing I'm  
22 understanding is being asked in the question is whether he's  
23 been involved in other transactions involving the transfer of  
24 exchange traded derivatives. And I recall that a Barclays'  
25 witness was asked a similar question. I'm going to overrule

1 the objection. It goes to his relevant experience, but it  
2 doesn't make him an expert.

3 THE WITNESS: The -- I have been involved directly and  
4 indirectly in a number of those transfers over the years. When  
5 I say indirectly, it usually was in my capacity with the FIA or  
6 -- that is the industry association being concerned and  
7 involved to make sure these things are orderly. Or, in some  
8 cases, involved on behalf of clients who were not the parties  
9 who were transferors or transferees, but were parties who were  
10 doing business with the entity that was in trouble.

11 And I go back, actually the first example was when I  
12 was actually at the CFTC, a company called Volume Investors, a  
13 small FCM that I think became insolvent and had its positions  
14 transferred, and there -- in all of these examples, the  
15 positions, as I recall them, were that the futures and options  
16 on futures accounts, as well as the -- all of the collateral  
17 and margin that were in those accounts.

18 Following that, there was the matter of Drexel, which  
19 I recall probably in the late '80s. My best recollection and  
20 I'm not precisely sure of this, I think the Drexel futures  
21 positions were transferred to Prudential Bache, I think, at  
22 that time, and again, my best recollection is that the  
23 positions and margin went with the transfer.

24 There were two small bankruptcies around in the early  
25 -- in the first decade in 2000, 2003 to 5, one called Griffin

1 and another called Cline (ph), those two also, to my best  
2 recollection, involved transfers of collateral and margin.

3 And then most recently in 2005, there was a transfer  
4 of -- there was an insolvency of a parent of Revco, which was  
5 -- Revco itself is a large financial house, but particularly  
6 they were a large FCM, and their positions and their margin  
7 were moved to, in that case, the Man Group and that was one  
8 that was probably a little bit closer to it.

9 BY MR. HUME:

10 Q If margin were not to be transferred as part of the  
11 transfer of an exchange traded derivatives account, would there  
12 need to be some kind of special provision mechanically to make  
13 that happen?

14 A Yes. I mean, it sort of -- it's strange even to  
15 contemplate, because that's sort of not the way business would  
16 be done, but in order to move a position from one clearing  
17 member -- I guess we should probably go back a step.

18 In addition to being a broker, Lehman was also a clearing  
19 member, and let's focus on the CME, since that's the largest  
20 U.S. futures exchange, which has about ninety-five percent of  
21 the futures volume, they would also be a clearing member of the  
22 CME. And the CME in calling and asking about Barclays'  
23 involvement was to move from one clearing member, Lehman, which  
24 was in trouble, to a solvent and secured clearing member,  
25 Barclays.

1 In order to move positions, a position, an individual  
2 futures position has to have, not just a contract that entitles  
3 you to upside and downside movement in a price in an individual  
4 commodity, but it also has to include the initial margin that  
5 -- and margin pool associated with that account.

6 So if you were not to transfer margin, the exchange would  
7 not accept the transfer because the account was not complete.  
8 It was missing margin. And so the only way to do it, and I  
9 haven't seen it done before, would be, you would basically have  
10 to fund the margin before the exchange would permit the  
11 transfer.

12 Q In your discussions with Lehman throughout the week of  
13 September 15th, 2008, did anyone at ever -- at any time ever  
14 suggest or indicate to you that Barclays would not be acquiring  
15 any of the margin associated with LBI's exchanged traded  
16 derivative accounts?

17 A No. That never came up, and it was never discussed, no.

18 Q Now, I think you mentioned before that your role was to  
19 contact the various exchanges. Can you remember which  
20 exchanges or clearing houses you contacted?

21 A Yes. We, starting on Monday, divided up that  
22 responsibility. My primary responsibility was the U.S. and so  
23 I reached out to the exchanges in the U.S., which would be  
24 primarily the CME, ICE futures, which has previously been  
25 called the New York Board of Trade, the Chicago Climate Futures



1 Exchange and its clearer, which was the Clearing Corp. The  
2 CBOE Futures Exchange, also called CFE and its clearer, which  
3 was OCC, and of course, the CFTC itself.

4 I did some very little bit of work internationally, but  
5 most of the responsibilities to reach out to the exchanges and  
6 regulators was left with the folks at Lehman, and I think in  
7 particular, Ron Filler. Most of my work was domestic.

8 Q Why was it necessary to seek approval from the exchanges  
9 for this transfer?

10 A You're not permitted to move positions. In the futures  
11 world, the bias of futures and the regulatory regime requires  
12 all futures to be traded through a central marketplace. It  
13 used to be a pit, now it's an electronic marketplace.

14 The idea being that the public can see the transaction,  
15 there's effective price discovery, and people can use that  
16 market effectively for hedging, because the volume comes  
17 through it. You're not allowed to privately negotiate a  
18 transaction away from the market, absent certain very specified  
19 exceptions.

20 One of those exceptions is something called the bulk  
21 transfer rule. And the exchanges, each exchange has something  
22 that permits a bulk transfer. In order to qualify for a bulk  
23 transfer, you've got to get permission from the exchange, and  
24 the permission focuses on several things.

25 One is the solvency and creditworthiness of the recipient.

1 Two, it focuses on, and this is an easy one, because the CME  
2 had already raised the point, convincing the exchange that the  
3 entity that is transferring is in trouble and needs to  
4 transfer. And fundamentally the rule talks in terms of a  
5 decision that is non recurring. You can't get these bulk  
6 transfers every week and move positions at will. It really is  
7 a finality event, in this case would be appropriate because  
8 Lehman would be getting out of the futures business and  
9 transferring its business to someone else.

10 So we went to the exchanges and asked them about  
11 permitting that bulk transfer.

12 Q Can you explain why the solvency of the transferee is  
13 important to the exchange or clearing house?

14 A Well, obviously starting on Sunday when the CME raises a  
15 concern, they're concerned about the market's continuing  
16 ability to function. That is, basically people meeting their  
17 debts, they're not being in default, and if there's a default,  
18 there's all sorts of cataclysmic consequences in terms of  
19 required liquidation.

20 So they're very concerned, and I think when they sought  
21 Barclays out, they realized that Barclays was effectively  
22 strong hands for a transaction of this type. They would not  
23 want to move from a solvent but troubled clearing member to an  
24 equally troubled new clearing member because they wouldn't have  
25 accomplished anything. They were looking to go from weak hands

1 to strong hands.

2 Q Can you just explain generally what it is that the  
3 clearing house or exchange does, and what it is that a clearing  
4 member does?

5 A Okay. A very good question.

6 The way in which futures functions is that the clearing  
7 house is basically people trade in an environment where your  
8 counter party is anonymous to you. If you buy, you don't know  
9 who the seller is, but there, of course, is a seller. Both of  
10 you effectively have a relationship with the clearing house.  
11 If I buy, the clearing house is my seller, and if I sell, the  
12 clearing house is my buyer. The clearing house stands in the  
13 middle.

14 In order to be effective as a clearing house standing in  
15 the middle, it handles all of the cash flow issues. Each day  
16 in futures, unlike in securities, each day in futures, there is  
17 something called mark-to-market. So each day if the position  
18 moves in my favor, I get a credit paid through the clearing  
19 house to me, and the clearing house pays that to me because  
20 they've gone to the other side, who had a debit, and collected.

21 So the clearing house also assures the performance of each  
22 clearing member, effectively. So if a clearing member is to  
23 default, the clearing house would take over the positions of  
24 that clearing member and manage those positions for the  
25 defaulting clearing member.

1 And so the clearing house performs this very important  
2 solvency function. Clearing is a very popular concept. It's a  
3 huge concept today in the recent legislation that was passed by  
4 Congress, because of a strong feeling that this is a very  
5 effective way to manage risk, by putting it into a central  
6 location.

7 The clearing member is basically the intermediary between  
8 the customers and the clearing house. The clearing house  
9 technically only knows the clearing member. It doesn't know  
10 the customers. The customers trade through the clearing member  
11 into the clearing house.

12 So Lehman was acting as a broker for their customers, it,  
13 Lehman would collect margin from their customers and put it  
14 into the clearing house. And that would be the variation  
15 margin I discussed, daily mark-to-market, but in addition,  
16 there's something called initial margin.

17 Initial margin is there to secure the performance of the  
18 clearing member, and the customer ultimately, in terms of daily  
19 moves. It's not a guarantee of performance, but it's a bond,  
20 it's sort of a good faith deposit, if you will, to support the  
21 position of the customer in the market.

22 Q Lehman, as a clearing member, would have those margin  
23 deposits with the clearing exchange, correct?

24 A The -- it's actually in two locations. They would be  
25 posting the initial margin with the clearing house, although

1 it's a little bit complicated, because in some exchanges  
2 there's a gross margin regime. Other exchanges, a net margin  
3 regime, but if they don't post it at the clearing house because  
4 it's a net margin, they would hold it at a clearing bank in  
5 their name, pledged to the clearing house.

6 So they can't take action at will to move money, they have  
7 to get the blessing of the clearing house to do it.

8 Q So is the clearing house protected, to some degree, by  
9 those pledged margin deposits?

10 A Absolutely. They rely on that margin as assurance. They  
11 -- you can't touch that margin. Each day you have to make  
12 these variation calls, but if you're unable to make those  
13 calls, they would seize that margin and try to use that margin  
14 to manage you out of the position.

15 Q Did the CME feel insecurity -- was it your understanding  
16 that the CME felt insecurity with respect to Lehman as a  
17 clearing member, notwithstanding the existence of those margin  
18 deposits?

19 A Correct. As I indicated, I was not privy to the calls  
20 with the CME on Sunday, but I did have a series of calls with  
21 them at the beginning of the week, Monday through Wednesday,  
22 and they expressed to me that in security, the reality is that  
23 that initial margin is, in no sense, sufficient to give comfort  
24 to a clearing house if the clearing member is in trouble.

25 They rely on the margin as the first call, but then they

1 rely on the capital and solvency and creditworthiness of the  
2 clearing member as the second call.

3 Given the chaos and volatility in the market that week of  
4 September 15th, the CME was emphatic about their insecurity,  
5 notwithstanding the fact that there was never a default, and  
6 never brought to my attention that they actually went through  
7 any of those margin positions.

8 Q Now, you referenced earlier something called a bulk  
9 transfer.

10 A Correct.

11 Q What is included in the concept of a bulk transfer from  
12 Lehman to Barclays?

13 A In this context and in all other contexts in which I am  
14 familiar, it would be permitting by the individual exchange to  
15 move all of the positions that the clearing member, in this  
16 case, Lehman, was carrying at that exchange, and all of the  
17 collateral and margin associated with those positions.

18 Each exchange would have its own bulk transfer rule, each  
19 exchange would permit the bulk transfer of the positions at  
20 that exchange.

21 Q With respect to the CME and the other exchanges that you  
22 contacted, did Lehman have both customer accounts and  
23 proprietary accounts?

24 A It certainly did at the CME. There were several exchanges  
25 where they only had proprietary accounts, and I believe one

1 exchange where I think they only had customer accounts.

2 Q Can you just briefly explain the difference between --

3 A Right.

4 Q -- a proprietary account and a customer account?

5 A Right. In futures, the -- Lehman is wearing two hats, and  
6 Lehman as a clearing member is clearing for two communities.  
7 One community would be customers, in which it would act as an  
8 agent, and act formally as an FCM, futures commission merchant,  
9 brokering those transactions and handling the pays and collects  
10 for those customers, and typically charging those customers a  
11 brokerage commission for trading.

12 And then separately, Lehman, the clearing member was also  
13 clearing for the house, so-called proprietary accounts. And  
14 this would be Lehman using the futures market to hedge their  
15 cash exposure in treasuries or securities or other instruments.  
16 It also potentially could be to have proprietary trading of  
17 Lehman be speculative trading, if Lehman had a view of the  
18 market, they could take a speculative position.

19 At the clearing house that -- Lehman would have two  
20 accounts. One is an omnibus customer account, the clearing  
21 house would know that account, and that account is subject to a  
22 segregation regime. And then a proprietary or house account.  
23 That account is not subject to a segregation regime, because  
24 it's Lehman or Lehman affiliates' money, and therefore, doesn't  
25 -- is not entitled to the same protection.

1 In the event of a bankruptcy, a bit of digression, but in  
2 the event of a bankruptcy under the rules, the customer's seg  
3 account is entitled to very specified preferences, in order  
4 that the customers are protected.

5 Q Can you explain what it is when you mean subject to a  
6 segregated regime?

7 A Right. Basically, the CFTC has a series of rules, which  
8 among other things, require that the bank that is banking that  
9 customer's segregated account, has to represent in a letter to  
10 the clearing member, in this case, Lehman, that the bank will  
11 not seek to any offset or lien against this customer's  
12 segregated account on account of any default or nonpayment or  
13 debt owing from any third party, including the FCM itself.

14 So if the FCM were to be insolvent and owe the bank money,  
15 the bank could not go after this segregated account to collect.  
16 The segregated account is pristine, and so in the event of that  
17 bankruptcy, the hope would be that that account could move in  
18 bulk to a safe location, because it would be full. That's an  
19 assumption that oftentimes is not the case, because in many  
20 cases, again I'm sorry for a digression, but in many cases, the  
21 bankruptcy is as a result of a non-performance of a customer,  
22 and then the account may not be full.

23 Q Is it standard practice, in your experience, for the  
24 broker dealer, in this case, Lehman, to have proprietary assets  
25 in the customer account to ensure that the seg or secured



1 requirements are always met?

2 A Yes. That would be absolutely standard. Some people call  
3 it a buffer. They would put that in because on each day, the  
4 market moves, and in many cases, customers could be a little  
5 bit slow in putting up money.

6 And so in order not to be under seg'd, which is a report  
7 that they have to give to CFTC daily, in order not to be under  
8 seg'd, they typically put in some money. It will vary from  
9 firm-to-firm as to how much, but there typically is some buffer  
10 and some cushion, so that they don't have to report being under  
11 seg'd.

12 If they report being under seg'd, there are all kinds of  
13 collateral consequences to them of that, and that's obviously a  
14 bad development from a customer protection perspective, and so  
15 something that they desperately seek to avoid.

16 Q So is that buffer of proprietary assets, that's in the  
17 customer account, put there for the benefit of the customers?

18 A Absolutely. It is -- and the entire account, that entire  
19 segregated account, as I indicated, is subject to effectively a  
20 lien by the clearing house. And so it becomes the broad  
21 property, again subject to whatever happens on dissolution, but  
22 broadly stated, the property that the clearing house would look  
23 to for protection.

24 Q In all of your discussions during the week of September  
25 15th, 2008, did anyone ever distinguish between the various

1 categories of margin you just described, those in the  
2 proprietary account, those in the customer account that are up  
3 to the seg and secured limit, or what you've called the  
4 proprietary buffer? Was any distinction made amongst those  
5 different categories in terms of what would transfer to  
6 Barclays?

7 A No. There were no distinctions, and in fact, there was  
8 really no discussion on the topic. In my view, based on my  
9 experience and knowing how these things happen, this would be  
10 what would be expected, and anything else would be awkward and  
11 novel.

12 Q Now, what were your subsequent discussions with the CME  
13 during the week of September 15th after the Monday?

14 A We had a series of discussions during the week about their  
15 insecurity. And they wanted progress reports, as did a lot of  
16 others, as to what was happening in terms of Barclays' decision  
17 whether to take over the account or not.

18 I particularly remember one conversation that I had on  
19 Wednesday evening, which would be the 17th. I was at a dinner  
20 that night, and when I returned from the dinner, I checked  
21 messages, and realized I'd received several messages from the  
22 CME. I called them back between midnight -- 11:00 o'clock and  
23 midnight.

24 I reached the leadership of the exchange, the president of  
25 the exchange, the general counsel, their outside counsel, and

1 the head of their clearing house, all were at the CME's offices  
2 when I called them between 11:00 and midnight.

3 They indicated that they were dissatisfied with Lehman.  
4 They had hoped that Lehman would be -- would have radically  
5 reduced their position over the first few days of the week.  
6 They hadn't seen a lot of movement. They were concerned that  
7 Lehman was not being responsive and they were generally  
8 concerned about the solvency of Lehman, the broker dealer, FCM,  
9 and that they, as a result, they were prepared to take action  
10 to take over the accounts, the proprietary accounts that were  
11 at CME, and auction them off.

12 The reason for the call to me, was they wanted to know  
13 whether Barclays was prepared to guarantee those positions, in  
14 which case, they would forestall, based on a guarantee from  
15 Barclays, whose solvency they expressed to me they were not  
16 concerned about.

17 I told them that it was, you know, approaching midnight, I  
18 wasn't sure who I could reach at Barclays, could I get back to  
19 them in the morning when -- you know, as soon as trading and  
20 business opened. They said no, that was not satisfactory, I  
21 needed to get back to them within the hour, that if I didn't  
22 get back to them within the hour, they would take action, they  
23 were not prepared to wait, but they would hold off for another  
24 hour to hear back from me.

25 Obviously, in my experience, you know, given the time and

1 the hour and the like, that's a pretty high level of expression  
2 of distress.

3 Q What happened next?

4 A I reached out to Barclays, informed them of my  
5 conversation. I was able to reach them within the hour, and  
6 communicated back to the CME that the transaction had not  
7 matured to a level that Barclays was comfortable stepping up  
8 and guaranteeing.

9 Somewhat of a digression, but during the course of the  
10 first several days of the week, in addition to the work with  
11 the exchanges, there were people in operations at Barclays  
12 trying to get a better handle on the Lehman positions, and I  
13 think that was another reason. They didn't really have the  
14 kind of information that they wanted to be able to make an  
15 assessment. But a guarantee, given the tumult in the market  
16 was really, in this case, a classic blank check, and they were  
17 not prepared to write it.

18 And I informed the CME of that, and to my knowledge, the  
19 auction took place before the opening on Thursday morning. So  
20 that by the time the market opened on Thursday morning, all of  
21 the proprietary positions of Lehman at the CME had been moved  
22 to the winning bidders in this auction.

23 Q Can you turn -- you should have a witness binder, which I  
24 think was handed out. Can you turn to tab two of that, where  
25 there is -- there are excerpts from a document the trustee

1 filed with the Court within the last ten days or so entitled  
2 trustee's preliminary investigation report and recommendations.

3 Do you see that?

4 A I do.

5 Q And this is BCI Exhibit 970. And the excerpt I'd like to  
6 direct your attention to is marked as page 68 and paragraph  
7 142.

8 MR. HUME: Which can also be put up on the screen.  
9 Right. If we could just blow up paragraph 142 and highlight  
10 the first sentence.

11 Q It says, in the aggregate, along with LBI's proprietary  
12 positions, the CME transferred to the winning bidders more than  
13 \$465 million in equity to offset the net short value of the  
14 positions, as well as more than one billion dollars in risk  
15 related concessions, representing nearly all of the performance  
16 bond or quote, margin, that LBI had posted with the CME's  
17 exchanges associated with those positions.

18 Do you see that?

19 A Yes, I do.

20 Q Is that consistent with your recollection of what happened  
21 after the CME decided to auction off Lehman's proprietary  
22 positions?

23 A My knowledge at the time was a bit more general and less  
24 precise than this. I had understood that the auction bidders  
25 basically in each case, took over the positions in the account

1 that they took over, and all of the collateral and margin  
2 associated with that account, those positions.

3 I had heard, and this is not first-hand, I'd read it in  
4 the press, and also heard it from the various reports, that it  
5 was about 1.6 billion. This number is a little bit less, and I  
6 hadn't seen until this document, how it was broken down between  
7 net short option equity value versus margin.

8 But it's generally consistent with what I had heard, which  
9 is that associated with the transfer of the positions, the  
10 contracts themselves, was a transfer of all of the margin that  
11 was up at the exchange with respect to those positions.

12 Q Can you explain why it is that the CME would be  
13 transferring assets to the winning bidders? Normally one  
14 thinks in normal parlance, a bidder pays something to take over  
15 whatever it's bidding on.

16 A Right.

17 Q Does this say that the CME is actually sending assets to  
18 the bidders?

19 A Absolutely right. And that would be expected, because  
20 what we have here is the bidder is being asked to take on a  
21 number of futures contracts. Those futures contracts represent  
22 to the bidder, risk. It also potentially represents up side,  
23 but it certainly represents risk.

24 And the bidder's first thought is, what do I have to  
25 protect me from losing money on these positions. Because if

1       theoretically in most of the cases this is true, the bidder  
2       will be wanting to sell those positions, because in fact, if  
3       the bidder really wanted those positions, they would already  
4       have them.

5             In other words, if hypothetically the bidder was a  
6       commercial hedging their exposure, they would've already put on  
7       the hedge. So they're taking on positions that expose them.  
8       And so their first thought is, if I liquidate these positions,  
9       I need -- I'm expected when you sell something, it typically  
10      will have a negative impact on price. And if you're a  
11      distressed seller as Lehman or Lehman's family would be, it  
12      would probably be more dramatic effect on price.

13            So the question for the buyer is, what do I have to give  
14      me some security that I can get out of these positions and not  
15      lose a lot of money, and that would be the margin associated  
16      with the position.

17            Even with that margin, the bidder would be taking risk,  
18      because he wouldn't know that the margin would be sufficient.  
19      And given the volatility of the market that week, this was  
20      significantly a risk for any one of these bidders and buyers.

21      Q       So does the bidder bid by stating how much margin it needs  
22      to take on the positions?

23      A       Yes. Basically, what would be assumed is, what the CME  
24      has gone to the bidder with is, we're telling you to take on,  
25      you know, 50,000 crude oil futures contracts. And to be clear,

1 there's no value technically in that contract, because as I  
2 indicated earlier, there is each day, a mark-to-market  
3 payments. There's no embedded value in the futures contract.  
4 So it basically represents risk or reward, depending upon which  
5 way the market moves.

6 And how much margin do you need to carry that -- to take  
7 on that position, take on that risk. And not surprisingly,  
8 that negotiation would revolve typically around the amount of  
9 margin that was up at the exchange.

10 Q Other than the CME, were there any other exchanges or  
11 clearing houses that you spoke with and that took action that  
12 week to protect themselves?

13 A Yes. The second largest futures exchange is something  
14 called ICE futures, that's an acronym for the Intercontinental  
15 Exchange, they bought a futures exchange called the New York  
16 Board of Trade, they were -- they had a much smaller exposure.  
17 I don't recall its exact size, but it was significantly smaller  
18 than the CME did. But they were in constant communication with  
19 me during the course of the week.

20 When they heard that the CME had taken action on Thursday  
21 morning, they informed me that they too were going to be taking  
22 action. I informed -- they didn't ask us about a guarantee, I  
23 didn't offer one, and my recollection is that they liquidated  
24 they -- the position -- I'm sorry, they auctioned off the  
25 positions that they had sometime Thursday or early Friday.



1 I'm not aware of the other exchanges I've talked about who  
2 actually took action. There were exchanges outside of the U.S.  
3 who took a variety of action that we learned about later.

4 Q Did you have any discussions that week with the Options  
5 Clearing Corporation or the OCC?

6 A Yes. Had a series of discussions with the OCC. As I  
7 indicated early on, we reached out to them to talk about what  
8 positions they had and the possibility of bulk transfer.

9 As I indicated, the -- for these purposes, OCC, as I think  
10 you're aware, OCC has a clearing operation for securities, but  
11 they have a separate clearing corporation for futures. And  
12 they clear, in addition to clearing CBOE, Chicago Board of  
13 Options Exchange and the other options, securities options  
14 exchanges, they clear futures and particularly for an  
15 organization called the CBOE futures exchange.

16 At my earlier conversations with them, it was just sort of  
17 to inform them that we were involved, we were looking to do a  
18 transaction, we wanted to keep them in the loop, and it was  
19 pretty high level.

20 Toward the end of the week, they indicated to me, and I  
21 have a long-standing relationship with both their inside  
22 general counsel and their outside counsel, probably know both  
23 of them for over twenty years. They were indicating some  
24 nervousness about the securities portfolio, but on -- some time  
25 on, I believe it was late Friday, I learned about it, and I

1 think it was from them, that they realized that a Lehman  
2 affiliate had a very large position in a contract that was  
3 traded on the CBOE futures exchange, a so-called volatility  
4 index contract.

5 And they informed us of that, that was the first time that  
6 Barclays had heard of that. Lehman had not informed us of it.  
7 The position, in addition to being very large, was actually  
8 short volatility. That is, the bet, if you will, that the  
9 Lehman entity was taking, was that volatility would go down,  
10 and bear in mind, the week we're talking about, the volatility  
11 was going through the roof. And so this was a very risky, a  
12 very risky position.

13 And so certainly, the OCC was concerned about it, and when  
14 Barclays heard about it, they too were very concerned about it.

15 Q I'm going to come back to that, but before I leave this  
16 document, let me ask you to turn to the first page I've  
17 excerpted in the binder, page 37 under paragraph 73, it talks  
18 about other actions by U.S. exchanges, and it has the first  
19 bullet point. This is page 37. It's in your binder if not on  
20 the screen.

21 A I do see it.

22 Q The first bullet point says, the Options Clearing  
23 Corporation invoked its exchange rules as a basis to refuse to  
24 release over \$400 million of computed excess margin on  
25 September 19th, 2008.

1 At the time, were you aware of that event?

2 A I was not. I was generally aware that OCC, during the  
3 course of the week, that OCC, as with the other exchanges I've  
4 highlighted and other clearing corporations, was increasingly  
5 nervous about what was going on with Lehman. And I also was  
6 aware -- I didn't know till after exactly the numbers, but that  
7 there were very significant movements in the positions that  
8 Lehman had up at the OCC, and therefore, very significant  
9 changes in the margin requirements.

10 I didn't hear about this event on Friday until sometime  
11 thereafter. But it certainly wouldn't surprise me the exchange  
12 has the discretion to do that, and if they're insecure, they're  
13 going to make sure to collect and keep as much money as they  
14 can, because they don't know, you know, whether Lehman is going  
15 to pony up when the next margin call comes.

16 I did on Friday and through the weekend have discussions  
17 with OCC about their insecurity, and they -- while they never  
18 liquidated or auctioned off any positions, they did indicate  
19 over the weekend, that they were prepared to do that, and would  
20 do it unless Barclays stood up and basically stood behind those  
21 positions before and met the margin call on Monday morning, and  
22 that's a topic we may want to discuss as well.

23 MR. HUME: Your Honor, we may come back to this  
24 document, but we'd like to move BCI Exhibit 970, this trustee  
25 report, into evidence.

1 THE COURT: The whole report or just these excerpts?

2 MR. HUME: I think the whole report is the exhibit.

3 We've only used the excerpts just to save space in the binder.

4 MR. MAGUIRE: No objection, Your Honor.

5 THE COURT: The whole report is in.

6 (BCI's Exhibit No. 970 was received.)

7 MR. HUME: Thank you.

8 THE COURT: And it's about five minutes past our  
9 typical lunch break. I just wanted to get some sense of  
10 anticipated scope?

11 MR. HUME: I'm about half -- about halfway through,  
12 maybe a little more.

13 THE COURT: Okay. I think we should break for lunch.  
14 But since a number of people may need to leave early today, I  
15 think we should make the lunch hour a little bit shorter than  
16 usual, so let's return at 1:45.

17 MR. HUME: Your Honor, I neglected to say earlier,  
18 Judge, that the witness, for the holiday has to leave at 4:00,  
19 so we would appreciate starting earlier, and I'll try to move a  
20 little more quickly, so that in the hopes that we can finish  
21 everything today.

22 THE COURT: I need to leave early, too, so with that  
23 in mind, we're not going to past some reasonable hour this  
24 afternoon, and what's the anticipated cross for this witness?

25 MR. MAGUIRE: I don't anticipate we'll have a problem,

1 Your Honor, if Mr. Hume is, as he says, on time, I think we  
2 should comfortably leave at 4:00 p.m.

3 THE COURT: Let's see if we can leave by 3:30 or 4:00  
4 at the latest.

5 MR. HUME: Thanks.

6 THE COURT: Okay. We're adjourned till 1:45.

7 (Recessed at 12:37 p.m.; reconvened at 1:50 p.m.)

8 THE COURT: Be seated, please. And please proceed.

9 MR. HUME: Thank you.

10 BY MR. HUME:

11 Q Afternoon, Mr. Raisler.

12 A Afternoon.

13 Q Before the lunch break, you had given some testimony about  
14 the CME and its concerns and its requests in the middle of the  
15 week that Barclays guarantee proprietary accounts of Lehman.  
16 Do you recall that?

17 A Yes, I do.

18 Q Was that request from the CME for Barclays to provide a  
19 guarantee similar or dissimilar to a request that Barclays take  
20 over the account?

21 A As I understand it -- as I understood it from the CME at  
22 that time, they were merely asking us to be a backstop. That  
23 is to say that if hypothetically Lehman were to run through all  
24 of the margin in their account, they -- the exchange would look  
25 to Barclays to meet that shortfall.

1 Taking over the account would give, theoretically would  
2 give, Barclays the right to liquidate as they saw fit. I  
3 didn't see that as part of the guarantee to manage the account  
4 in any way they wanted to, and to the extent that the account  
5 were to make money, or in those situations, that would be for  
6 the benefit of Barclays.

7 I saw the guarantee merely as being just a you stand  
8 behind the position, and whatever happens, happens, and I think  
9 that's certainly I'm sure the way that Barclays understood it  
10 as well.

11 Q And you used -- I think you used the phrase writing a  
12 blank check. Can you explain what you meant by that?

13 A Well, basically if the positions, and again, we have to be  
14 reminded how volatile the market was during that week, if the  
15 positions ran away from Lehman, then basically the exchange  
16 would be coming -- the clearing house would be coming to  
17 Barclays to make good on that shortfall, and whatever that  
18 amount was, it was not I say blank, because the exchange was  
19 not saying guarantee us up to a hundred million dollars, they  
20 were saying, provide an unlimited guarantee.

21 So whatever the loss would happen to be, it would be a  
22 decision by Barclays to step up and meet that loss.

23 Q Now, more generally, and not just with respect to the CME,  
24 you explained that they were Lehman proprietary accounts and  
25 customer accounts at many of these exchanges.

1 A Correct.

2 Q Do you know or do you recall one way or the other, whether  
3 Lehman affiliates were uniformly in the proprietary account or  
4 the customer account?

5 A As a matter of rule, the affiliate would be a proprietary  
6 account, and so it would be carried by Lehman in their  
7 proprietary accounts at each of the exchanges and clearing  
8 house locations.

9 Q Do you recall looking at Lehman's options proprietary  
10 accounts and whether affiliates -- excuse me, Lehman's customer  
11 accounts with respect to its options trading and whether  
12 affiliates were treated as customers in those accounts?

13 A And here we're talking about equity options, not options  
14 on futures?

15 Q Correct.

16 A I don't purport to be an expert on the equity option  
17 rules, and I candidly don't recall.

18 Q Okay. And regardless of which account they're in, do you  
19 know one way or the other -- let me ask another question, sir.

20 Was it your understanding that the collateral posted in  
21 all of these various accounts was LBI collateral owned by LBI,  
22 the broker dealer?

23 A We're talking again here with respect to the equity  
24 options positions, correct?

25 Q More generally on the futures positions you looked at, the

1 futures accounts you looked at.

2 A Okay. With respect to the futures accounts in the  
3 proprietary world, for the proprietary, the house accounts, my  
4 understanding is that those assets were those of LBI.

5 Obviously, on the customer side, it would be combined customer  
6 money as well as what we talked about earlier in terms of  
7 buffer.

8 Q And when you were talking about the options clearing  
9 corporation, you distinguished between what I think you called  
10 securities and the fact that futures also clear there. Do you  
11 recall that?

12 A Correct. There are actually two separate clearing  
13 organizations within one umbrella of the OCC.

14 Q And when you refer to securities as opposed to futures  
15 clearing through the OCC, do you mean by securities, equity  
16 options?

17 A That's correct.

18 Q Which are options on equities?

19 A Correct. As a result of machinations that only Congress  
20 could contemplate, the world is divided between equity options  
21 which are subject to an SEC regime, and options on futures  
22 including stock index options, which are subject to the CFTC's  
23 regime. So that's the distinction I'm really focusing on.

24 Q Can I ask you to turn tab 3 of your binder, the witness  
25 binder, which is BCI Exhibit 220. And at the top of that



1 exhibit is an internal e-mail exchange at Weil Gotshal dated  
2 September 19th, 2:13 p.m.

3 Do you see that?

4 A Yes, I do.

5 Q And the subject is, urgent, Options Clearing Corp. issue  
6 re: Barclays/Lehman transaction.

7 Do you see that?

8 A I do.

9 Q And the first e-mail is from Shia Waisman at Weil Gotshal  
10 and it says, another sale order change.

11 Do you see that?

12 A Correct.

13 Q Did it come to your attention during that week that the  
14 OCC requested a provision to be inserted in the sale order that  
15 would be issued by the Court to approve the sale?

16 A Yes. The OCC, as we discussed earlier, had insecurities  
17 with respect to performance by Lehman, and in particular that  
18 Friday, the 19th was what is called a triple witching day.  
19 Such days occur four times a year where options on securities,  
20 options on futures, and futures themselves expire, and so  
21 that's a particularly volatile and sensitive day.

22 OCC wanted to be assured that when they opened on Monday,  
23 that all of the collateral calls would have been met, and it  
24 was that in which they were seeking security from Barclays in  
25 the sale order, that Barclays would stand behind those

1 obligations Monday morning.

2 Q And if you turn to the second page of this document, and  
3 the second half of that page is an e-mail from James McDaniel  
4 at Sidley & Austin. Do you know him?

5 A Yes, I do. I mentioned earlier that both Bill Navin,  
6 who's the general counsel of OCC and Jim McDaniel, who is  
7 outside counsel at Sidley to OCC are long time friends, yes.

8 Q And this is e-mail is from him to a lawyer at Cleary  
9 Gottlieb and then it's forwarded on to Weil Gotshal, which  
10 lists -- he says, Seth, below is the language that OCC would  
11 like to have inserted in the sale order.

12 Do you see that?

13 A Yes, I do.

14 Q And below that, he has the proposed insert, that begins  
15 with the phrase, notwithstanding the foregoing.

16 Do you see that?

17 A Yes, I do.

18 Q And it goes on to say, we can read it on the screen,  
19 notwithstanding the foregoing as of the closing date, all  
20 obligations to the Options Clearing Corporation with respect to  
21 purchased assets, that are within the possession or control of  
22 OCC, shall have been assigned to the purchaser, and the  
23 purchaser shall have assumed all of such obligations, including  
24 without limitation, all obligations with regard respect to  
25 short option positions, futures contracts, and stock loan or

1 borrow positions that are transferred to the accounts of  
2 purchaser at OCC, as of the closing date, in accordance with  
3 the purchase agreement.

4 Do you see that?

5 A Yes, I do.

6 Q And is that consistent with your recollection that the OCC  
7 was trying to protect itself and ensure that Barclays would  
8 take over all of the settlement obligations associated with  
9 Lehman's accounts at the OCC?

10 A That is correct.

11 Q Now, the next sentence says, from and after the closing  
12 date, all securities, cash, collateral and other property  
13 transferred to accounts of the purchaser at OCC shall be  
14 subject to all rights of OCC therein, in accordance with the  
15 bylaws and rules of OCC, including without limitation, the  
16 security interests and set-off rights of OCC with respect  
17 thereto.

18 Is that sentence consistent with your understanding that  
19 all of the margin in the LBI accounts would be transferred to  
20 Barclays as of the closing date?

21 A Yes. And that once transferred, they would be subject to  
22 OCC rights, as a -- as I mentioned earlier, each of the  
23 clearing houses have a security interest, a preferential  
24 security interest in each of these accounts, and that sentence  
25 reflects the fact that OCC is not giving that up upon the

1 transfer of that margin to Barclays.

2 Q It says, all securities, cash, collateral, and other  
3 property.

4 Do you see that?

5 A Correct.

6 Q And did you understand that margin deposits, to secure  
7 exchanged traded derivative obligations could be held either in  
8 the form of cash, or in the form of other collateral?

9 A Of course.

10 Q Did anyone at any time during that week suggest to you  
11 that Barclays would acquire some of the margin collateral that  
12 was not in the form of cash, but would not acquire collateral  
13 that was in the form of cash?

14 A No. It was -- I mean, as we discussed earlier, the  
15 broader issue never came up, and the subset that you've  
16 described never came up in all of our discussions and all of  
17 our efforts, it was to move the accounts which included the  
18 positions and all of the collateral in whatever form.

19 Collateral takes a variety of forms. In fact, very often,  
20 people will put up treasuries, they may expire, they turn to  
21 cash, they get reinvested, there's a whole variety of ways in  
22 which that money is managed by the clearing firm, and in some  
23 cases, by the clearing house.

24 Q Let me -- and to your recollection, did anyone object to  
25 the insertion of this language into the sale order?

1 A Not to my knowledge, no. It went in and was also the  
2 transfer and assumption agreement which reflects the same sort  
3 of -- the same sort of rights that OCC had and the comfort that  
4 they needed to not act to liquidate these positions.

5 Q Let me, if I could, refer you back to the excerpts of the  
6 trustee report that's at tab 2 of the binder, and to the last  
7 page of the excerpt, in paragraph 248.

8 The first sentence of that paragraph says, similarly, on  
9 the evening following the liquidation filing, and during a  
10 recess at the hearing itself, the OCC threatened not to  
11 transfer any accounts unless Barclays stepped into LBI's shoes  
12 at the OCC.

13 Do you see that?

14 A Yes, I do.

15 Q Do you recall over that weekend between the sale hearing  
16 approval of this Court and the closing on Monday, that the OCC  
17 was still threatening to liquidate Lehman's accounts if  
18 Barclays did not agree to take them over?

19 A That was my distinct recollection from conversations I had  
20 and were reported to me over the weekend with OCC.

21 Q And were you generally aware that Barclays was concerned  
22 about the risks that might be associated with those accounts?

23 A Certainly, and as I discussed earlier, one small example  
24 of that was the VIX position which had very significant risk in  
25 it, and that was just a small example of the risks that

1 Barclays was worried about.

2 Q On the next sentence I'd like to direct your attention to  
3 in the trustee's report says, Barclays agreed when it realized  
4 that this arrangement was likely to produce a substantial  
5 windfall for itself. Do you see that sentence?

6 A I do.

7 Q Did it ever come to your attention that week, before the  
8 closing at any time or after the closing, that Barclays  
9 believed it had received a substantial windfall in connection  
10 with the OCC accounts?

11 A No. That never came up in any discussions we had. The  
12 focus uniformly was on the risks associated with it, not -- and  
13 no one that I interacted with talked in terms of any profits,  
14 and certainly not any windfall profits.

15 Q Let me refer you to tab 4 of the binder, BCI Exhibit 267,  
16 which is an e-mail exchange between again the lawyers at the  
17 OCC, lawyers for the SIPC trustee and SIPC itself and lawyers  
18 for Barclays.

19 If I can refer you first to the second page, which is an  
20 e-mail from Jim McDaniel again, counsel for -- outside counsel  
21 for OCC, sent Sunday afternoon. He lists out three different  
22 points. The third of which is, if the transaction does not  
23 close tonight, OCC would need to immediately liquidate and  
24 close out the LBI accounts and is preparing to do so.

25 Do you see that?

1 A Yes.

2 Q In response to that e-mail, Stephen Harbeck sends a reply  
3 e-mail. And Stephen Harbeck -- do you know who Stephen  
4 Harbeck?

5 A I know he's with SIPC.

6 Q He's listed in this e-mail as President and CEO of SIPC.  
7 Do you see that?

8 A Yes.

9 Q His e-mail says in the first sentence, to Jim and Bill,  
10 those would be the lawyers for the OCC?

11 A Yes.

12 Q It says, Jim and Bill, I urge you in the strongest  
13 possible terms not to take precipitous action. I have every  
14 confidence that if all parties act responsibly, that all  
15 parties will actually be acting in their own best interests.

16 Do you see that?

17 A Yes, I do.

18 Q Is that consistent with your understanding that SIPC and  
19 the trustee did not want these clearing corporations to seize  
20 and liquidate the exchange traded derivative accounts?

21 A That was my understanding and recollection because of the  
22 disruption and the costs associated with that. And obviously,  
23 they had a precedent insofar as the CME had done effectively  
24 the same thing only two days prior, three days prior.

25 Q Now, in the e-mail in response to Steve Harbeck, the OCC's

1 lawyer, Jim McDaniel responds, saying, Bill has asked me to  
2 express OCC's intention not to act precipitously.

3 Do you see that?

4 A Yes.

5 Q If you go down that paragraph, he has a sentence that  
6 begins, however. However, OCC cannot allow the positions to  
7 remain in place if no transaction is concluded tonight, because  
8 OCC will then be exposed to loss, if the market moves against  
9 LBI's positions.

10 Do you see that?

11 A I do.

12 Q Now, based on your understanding of your -- from your  
13 involvement in these events, who would've been in a better  
14 position to know the extent of Lehman's margin deposits at the  
15 OCC, the OCC or Barclays?

16 A Well, certainly the OCC has a responsibility to know that  
17 to the detail. I don't know, I mean, certainly Barclays only  
18 got whatever Lehman gave them, and as I indicated earlier, that  
19 was inconsistent and generally incomplete.

20 Q If the OCC believed there were sufficient excess margin to  
21 create a windfall for Barclays, would they have been concerned  
22 about being exposed to loss?

23 A Hard for me to getting into their head to figure out what  
24 their thinking is, but it seems to me that what they're  
25 expressing here is that the market is extremely disruptive,



1 volatile, and they are not confident of the consequences of the  
2 opening even on Monday morning, where there had been a lot of  
3 tumult over the weekend specifically associated with Lehman,  
4 and a lot of people probably concerned that there would be non-  
5 performance. So that would be my look at it.

6 Q Now, you mentioned discovering the VIX positions at some  
7 point. During that week, were you involved in attempts to  
8 gather information relating to Lehman's exchange traded  
9 derivative accounts?

10 A Yes. Starting on Monday morning, we were a team. So it  
11 was myself, but it was also operations people at Barclays, we  
12 were trying to obtain information about what exchanges Lehman  
13 had positions through, and what were the contours broadly  
14 stated of those positions, because we needed to -- I  
15 specifically needed to visit with those exchanges to get  
16 permission to do the block transfers. And in addition,  
17 Barclays was trying to assess the risk of those positions, so  
18 more information for them the better.

19 Q Now, let me refer you, if I could, to tab 5 of your  
20 binder, which is Movant's Trial Exhibit 746. It has a cover e-  
21 mail from David Gilberg to a series of people at the CFTC, and  
22 then it says cc to you.

23 Do you see that?

24 A Yes, I do.

25 Q And can you explain who David Gilberg is?

1 A David Gilberg is my partner and another partner in the  
2 Commodities, Futures and Derivatives Group and we worked  
3 closely together on all matters, including this one.

4 Q And it attaches, I believe, a series of drafts of the same  
5 letter, which you can see if you flip a couple of pages back.

6 Do you see that?

7 A Yes, I do.

8 Q Can you explain what this letter is?

9 A As I indicated earlier, in addition to getting exchange  
10 approval for the block transfer, we needed to get specific  
11 approval from the CFTC for the transfer that we wanted to  
12 engage in at each of the exchanges in the U.S. This was a  
13 letter that we prepared to the CFTC seeking that relief and  
14 that approval.

15 The exchanges are permitted to do block transfers, but as  
16 the letter reflects, there's certain things that the CFTC has  
17 to approve, the exchanges themselves cannot do.

18 Q I'd like to direct your attention to the second page of  
19 the letter, and the last sentence of the first paragraph, which  
20 says, we understand that LBI has sufficient segregated and  
21 secured amount funds, as well as sufficient regulatory capital,  
22 pursuant to the provisions of the Commodity Exchange Act, and  
23 the Commission's regulations thereunder.

24 Do you see that?

25 A Yes, I do.

1 Q And can you explain the basis for that statement?

2 A Yes. I think that as of the time of this letter, we had  
3 no indication from any of the clearing houses around the U.S.  
4 that Lehman was in any way default on any of its obligations.

5 So by definition, they would've had sufficient regulatory  
6 capital again and secured seg funds. That doesn't tell you  
7 what their position might be tomorrow, based on market moves,  
8 but as of that time, having not been in default, they were in  
9 compliance with their regulatory requirements, and therefore,  
10 their funds were sufficient.

11 Q Does this say anything at all about LBI's margin with  
12 respect to any of its proprietary accounts?

13 A Not as such. The segregated and secured funds are both  
14 referencing customer accounts.

15 Q Does it --

16 A But the sufficient regulatory capital does have a  
17 relationship to proprietary accounts.

18 Q If you knew this information, was there other information  
19 beyond this that you and Barclays were trying to find out that  
20 week?

21 A Well, we were trying to find out more about the positions  
22 themselves, and the risks associated with those positions, in  
23 order to assess what would be involved in taking over the  
24 positions in terms of risk reduction and risk management.

25 The fact that they had sufficient regulatory capital at

1 any point in time is hardly comfort in a volatile moving  
2 market.

3 Q Would you -- was the information you were able to find  
4 that week before the closing, complete or incomplete?

5 A It was dramatically incomplete. One example I indicated  
6 earlier, is we didn't find out until Friday afternoon about  
7 this very large short volatility, this VIX position, which had  
8 not been disclosed to us, which was a position of a Lehman  
9 affiliate.

10 My best recollection it was brought to our attention not  
11 by Lehman, but by the OCC itself, and that position alone,  
12 again just as an example, represented a lot of risk to the  
13 extent that Barclays was being asked to take it over. My  
14 recollection as well is we didn't learn about some of the  
15 foreign exchange positions until several days after the  
16 closing, or in fact, even a longer time after the closing.

17 Q So were there both accounts and positions that you learned  
18 about even after the closing?

19 A That's correct. I mean, we didn't even know that they --  
20 we actually until the VIX position came up, we didn't know they  
21 had any open positions at the CBOE Futures Exchange. Equally,  
22 we found out about information Montreal and Sidney, where they  
23 had positions we didn't know they had.

24 Q Based upon your experience in the industry and your  
25 experience in the events of that week, what is your

1 understanding about the extent to which any margin deposits  
2 that Lehman held in any of its exchanged traded derivative  
3 accounts would've been available for the estate in the  
4 liquidation had there been no transaction with Barclays?

5 MR. MAGUIRE: Objection, Your Honor. This witness is  
6 not being proffered as an expert witness, and any testimony  
7 that he would give based on specialized knowledge would come  
8 within Rule 702.

9 THE COURT: Sounds right to me. It sounds to me as if  
10 the question does not delve into his activities during the  
11 relevant period, but rather his general observations as to what  
12 might have happened, and under those circumstances, the  
13 objection is sustained.

14 MR. HUME: Let me see if I can just do it briefly  
15 another way, Your Honor.

16 BY MR. HUME:

17 Q Did you have personal knowledge that week, Mr. Raisler,  
18 that the CME had closed out Lehman's proprietary positions, and  
19 that that had wiped out Lehman's margin deposits with respect  
20 to those positions?

21 A Yes, that's correct. We talked about that as something  
22 that had occurred before the opening on Thursday, the 18th of  
23 September.

24 Q Was it your understanding that other exchanges, at least  
25 one, the ICE exchange did the same thing?

1 A That is correct. And as we discussed, OCC was threatening  
2 to do the same thing as well.

3 Q My question, to your understanding --

4 A I'm sorry.

5 Q -- others were threatening to do the same?

6 A That's correct.

7 Q And so was it your understanding at the time that there  
8 was a serious risk, but if there was no transaction to  
9 Barclays, all the other exchanges would do the same thing?

10 A Yes. That risk was very clear and highlighted by the OCC  
11 communication that if the exchanges were to auction or  
12 liquidate positions, it would result in the transfer or  
13 utilization of all the outstanding margin, as was the case with  
14 the CME, leaving nothing in terms of positions or assets in the  
15 accounts for the Lehman estate.

16 Q Could the clearing houses -- do you have an understanding  
17 based on your expertise in this field, could the clearing  
18 houses either liquidate those positions or auction them?

19 A The exchanges -- the clearing houses have discretion as to  
20 how to manage the positions. The preferred route is auction,  
21 but if there aren't -- if there's no requirement that they go  
22 the auction route typically, they will liquidate if it's a  
23 relatively small amount of positions, but if it's a huge  
24 position and they're, if you will, dumping it on the market,  
25 they're probably going to be more inclined to auction. But

1 it's up to them.

2 Q Can either a liquidation or an auction create a liability  
3 for the -- for Lehman?

4 A Absolutely. It's not -- I mean, the CME was able to  
5 auction off the positions on the morning of the 18th without  
6 having to put up additional funds, because the buyers of those  
7 positions were willing to take the margin. But the reality is  
8 that particularly shortly thereafter, and depending upon the  
9 positions, there could be bidders for those positions who  
10 wanted not just the margin but more, in order to take those  
11 positions on.

12 The clearing house would have to make a judgment whether  
13 to put that money up and seek it against the estate, or try  
14 some other recourse. So to the extent that the margin was  
15 insufficient to get the auction done, there would be additional  
16 money needed, and that additional money would be a debt of the  
17 estate.

18 Q After the sale transaction closed on Monday, September  
19 22nd, did you work with the trustee and his representatives at  
20 Hughes Hubbard to identify Lehman's futures accounts to arrange  
21 for their transfer to Barclays?

22 A Correct. Most of that work was with respect to non-U.S.  
23 locations, and unlike the U.S, in many cases in the non-U.S.  
24 environments positions were either liquidated or moved, but the  
25 collateral was left behind, stuck in bankruptcy or other

1 regimes in foreign jurisdictions.

2 So we worked with the trustee, and in particular, I had  
3 regular communications with Chris Kiplock during the months  
4 after the closing to make sure that the rights of Barclays  
5 derivative of LBI were protected in those bankruptcy regimes,  
6 and that money was accounted for, and our hope was that that  
7 money got transferred back to Barclays.

8 Q And did that work that you did with Mr. Kiplock at Hughes  
9 Hubbard involve both Lehman proprietary futures accounts and  
10 customer futures accounts?

11 A Yes, it did.

12 Q And during those first few months after the closing, was  
13 there ever any mention by Mr. Kiplock that the trustee didn't  
14 believe Barclays was entitled to any of the margin or  
15 collateral associated with any of those accounts?

16 A Absolutely not. I mean, our communications were  
17 consistent with what I said before, a moving of the accounts,  
18 which includes the positions and the collateral.

19 Q Let me refer you briefly to tab 6 of your binder, which is  
20 BCI Exhibit 470, and involves internal e-mail at the top  
21 between Mr. Kiplock, whom you just mentioned and his colleagues  
22 at Hughes Hubbard, Carolyn Levine, and I think Laura Vecchio  
23 may have been a former Lehman employee. Do you know Carolyn  
24 Levine as well?

25 A Yes. Carolyn Levine was somebody in addition to Chris



1 Kiplock who we worked with at Hughes Hubbard during the time  
2 period.

3 Q He is responding to an e-mail chain below, and I'd like to  
4 direct your attention to the first e-mail in the chain, which  
5 again is from Jim McDaniel at the OCC, or at Sidley Austin who  
6 represents the OCC?

7 A That is correct.

8 Q And Mr. McDaniel is writing to Mr. Kiplack -- Kiplock on  
9 October 2nd, and says, Chris, to confirm my comments on the  
10 phone, clearing accounts under the 074 number on OCC's books  
11 that were formerly accounts of Lehman Brothers, Inc. have been  
12 transferred to Barclays.

13 Do you see that?

14 A Yes, I do.

15 Q And he references the transfer and assumption agreement.

16 Do you see that?

17 A Yes, I do.

18 Q It goes on, I'd like to just go down to the last line of  
19 that paragraph. As all accounts, under both numbers are  
20 accounts of BCI, meaning Barclays, OCC will continue to follow  
21 the directions of BCI and to transfer positions between these  
22 clearing member numbers, and otherwise act with respect to  
23 positions and collateral carried under both numbers, at the  
24 direction of BCI without consent from the trustee.

25 Do you see that?

1 A Yes, I do.

2 Q Is that consistent with your understanding at the time of  
3 how Barclays was taking over Lehman's exchange traded  
4 derivative accounts?

5 A Yes. Absolutely that is correct.

6 Q And at the top of the e-mail chain, Mr. Kiplock writes to  
7 his colleagues, I think we are okay with the below, we should  
8 revisit the LOC issue later, after transfers of collateral are  
9 affected.

10 Do you see that?

11 A Yes, I do.

12 Q Is that consistent with your understanding of Mr.  
13 Kiplock's approach to transferring collateral to Barclays after  
14 the sale closed?

15 A Yes. I don't recall any impediments or any issues raised  
16 about moving collateral until much, much later.

17 Q There is a letter sent, if you go to tab 7, on November  
18 14th, 2008 from Mr. Kobak of Hughes Hubbard to again, Mr.  
19 McDaniel of Sidley Austin representing the OCC.

20 Do you see that letter?

21 A Yes, I do, November 14th.

22 Q And you see that you are copied on that letter?

23 A Yes, I was, right.

24 Q And the beginning of that letter says, the trustee is  
25 aware of the transfer and assumption agreement dated September

1 19, 2008, which of course, I executed on his behalf, and the  
2 trustee fully intends to comply with its terms.

3 Do you see that?

4 A Yes, I do.

5 Q And are you familiar with the transfer and assumption  
6 agreement?

7 A I am.

8 Q What is your understanding of what the transfer and  
9 assumption agreement provides with respect to margin deposits  
10 and Lehman's accounts at the OCC?

11 A I don't have the words memorized, but it provided for the  
12 transfer of those accounts to Barclays, and subject to OCC's  
13 rights with respect to that account, consistent with the sale  
14 order provisions we discussed a few minutes ago.

15 Q Now, he goes on to say there remain between Barclays and  
16 Lehman estate certain open issues. And the beginning of his  
17 next paragraph says this, our position is that this collateral  
18 can be transferred to Barclays and the trustee will gladly  
19 consent if Barclays will live up to its bargain and assume the  
20 obligations involved for all customers, not just those in the  
21 so-called PIM accounts.

22 Do you see that?

23 A Yes, I do.

24 Q Now, at the time you received this letter and as of now,  
25 are -- do you have an understanding of whether Barclays has

1 lived up to its obligations with respect to customers?

2 A Yes, I believe they have. I'm confused a little bit by  
3 this letter, and I believe I was at the time, because while the  
4 PIM accounts were formerly transferred, the other accounts were  
5 still carried on the books at Barclays and Barclays had all of  
6 the obligations associated with those accounts vis-a-vie, the  
7 OCC. And I thought that would be all that would be necessary  
8 to satisfy the trustee.

9 Q As of the time you received this letter, did you have any  
10 understanding that the trustee was taking the position that  
11 Barclays was not entitled to any of the collateral associated  
12 with the exchange traded derivatives accounts it had acquired  
13 from Lehman?

14 A Absolutely the opposite. I mean, the language of this  
15 letter, but the whole history of communication including with  
16 the trustee was, that the collateral would move.

17 Q Let me refer you now to the next exhibit, tab 8 of your  
18 binder, BCI Exhibit 979, which is an e-mail exchange between  
19 you and Mr. Kiplock at Hughes Hubbard, a representative of the  
20 trustee.

21 The first e-mail at the bottom half of the page is from  
22 you dated December 23rd, 2008, an e-mail from you to Mr.  
23 Kiplock.

24 Do you see that?

25 A Yes, I do.

1 Q And you say, Chris, following our earlier discussion, we  
2 are attaching a chart showing the various accounts and balances  
3 along with copies of the account statements.

4 Can you explain what your e-mail was saying, and what is  
5 attached to your e-mail?

6 A Right. this was a combination of a regular dialogue with  
7 myself and Chris and the folks at Hughes Hubbard, trying to  
8 make sure that we had collectively identified all of the Lehman  
9 assets futures exchange traded derivatives, collateral assets  
10 outside of the U.S. and most particularly, that they, LBI, were  
11 filing protective claims with respect to those assets, because  
12 it was Barclays' view and the view expressed by me in this e-  
13 mail that we were entitled to those -- that collateral and  
14 those positions.

15 So I provided to Mr. Kiplock a profile of what we  
16 understood to be the positions around the world in exchange  
17 traded derivatives and the associated collateral, asking him to  
18 confirm that that collateral was to be transferred to us, and  
19 that they were filing all of the appropriate protections to  
20 secure for us our rights in those, in that collateral to the  
21 extent that they were stuck in various bankruptcy regimes  
22 around the world.

23 Q Your e-mail, I don't know if you just explained this or  
24 not, but it draws a distinction between accounts where there  
25 were no open positions at the time of transfer. You say in the

1 third sentence, in those situations where there were no open  
2 positions at the time of the transfer, BCI would not be seeking  
3 the collateral in those accounts, and is simply identifying  
4 those accounts for your benefit.

5 A Correct.

6 Q Can you explain that?

7 A Yes. It was only those accounts at the time of the  
8 transfer that had open positions, and therefore, had in fact,  
9 collateral associated with the exchange traded derivatives that  
10 we were seeking to recover.

11 To the extent that there was an account that had no open  
12 positions and just had money it in whatever form, cash,  
13 securities, of whatever, that was not, as we interpreted,  
14 associated with the exchange traded derivatives business, and  
15 therefore we were not seeking those assets, just -- but  
16 nonetheless, in order to be complete, we identified those  
17 assets in this communication, so that we would hopefully agree  
18 on what we learned around the world in terms of what was  
19 available.

20 Q Now, when you wrote this in December 2008, and you  
21 explained what you'd identified, did you hear back from the  
22 trustee telling you that Barclays had absolutely no right to  
23 any of the collateral associated with these traded derivative  
24 accounts?

25 A My best recollection it was a fair amount of radio silence

1 after that, and a letter was sent probably almost six months  
2 later. But at no time, did anybody raise with us the question  
3 that somehow we were not entitled to the collateral as asserted  
4 in this communication and prior communications.

5 Q There's a response from Carolyn Levine above this e-mail  
6 dated February 25th, 2009. She says, Ken, I wanted to touch  
7 base with you about the collateral related to futures accounts.  
8 Is there a time, Thursday or Friday, that would be good for me  
9 to give you a call.

10 Do you recall whether she ever, at that time in February  
11 2009, told you that the trustee believed Barclays was not  
12 entitled to any margin and any exchanged traded derivative  
13 account?

14 A No, it did not come up. The discussions and  
15 communications I had with Mr. Kiplock and Carolyn Levine were  
16 all about agreeing to what the assets were and telling us about  
17 the protections that they had filed with respect to them, and  
18 basically trying to coordinate.

19 MR. HUME: Your Honor, I'd like to move BCI 979 into  
20 evidence.

21 THE COURT: Any objection?

22 MR. MAGUIRE: No objection.

23 THE COURT: It's admitted.

24 (BCI's Exhibit No. 979 was received.)

25 MR. HUME: Thank you.

1 BY MR. HUME:

2 Q Mr. Raisler, at tab 9 of your binder is BCI Exhibit 920,  
3 which is a letter to you from Hughes Hubbard dated July 15th,  
4 2009.

5 Do you see that?

6 A Yes. This is the letter I referred to a while ago that  
7 was a -- I think the first -- my best recollection the first  
8 formal response we received to the communication I'd sent on  
9 December 3rd.

10 Q And it references in the second paragraph underneath that  
11 heading on December 23rd, 2008, we received a chart of  
12 accounts.

13 Do you see that?

14 A Yes, I do.

15 Q Did you understand that to be a reference to the e-mail  
16 we'd just looked at?

17 A I do, yes.

18 Q And can you just again explain what is happening here  
19 mechanically in terms of identifying all these accounts in July  
20 of 2009?

21 A Well, we were concerned that obviously the money was not  
22 moving, the assts were not moving back to Barclays, and the  
23 chart reflects assets in locations, in Asia, Europe, and other  
24 places, and the amounts were relatively substantial.

25 We wanted to make sure that the trustee agreed with us



1 about what the assets were, that the trustee was filing  
2 protective claims in those bankruptcy regimes where  
3 appropriate, and the trustee was doing all that they could to  
4 move those assets back to Barclays and consistent with the APA  
5 and the agreement we had with them.

6 And so the communication in December was to give them our  
7 understanding of the universe. This communication back in July  
8 is their response to our request by telling them -- telling us  
9 what they had done, and how they and we essentially and largely  
10 agreed on the amounts, the locations, and the protections with  
11 respect to this primarily collateral.

12 Q And you can take a minute to review the letter if you  
13 don't remember it, but does the letter say anything about the  
14 trustee taking the position that Barclays was not entitled to  
15 any margin associated with exchanged traded derivatives?

16 A Absolutely not. I've reviewed this letter and I remember  
17 it. There is nothing in the letter that speaks to Barclays not  
18 being entitled to part of the margin or any of the margin.  
19 It's completely silent on the issue. But it is responsive on  
20 the point of what we had requested in terms of documenting what  
21 the universe of assets were, and how and what protections had  
22 been filed with respect to them.

23 Q Now, you were not involved in negotiating the terms, were  
24 you, of the contractual documents, documenting the overall sale  
25 transaction?

1 A I was not.

2 Q I'd still like to refer you to tab 23 of the binder, which  
3 is BCI Exhibit 5, which is the clarification letter. Are you  
4 familiar with this document?

5 A Yes. I was not a drafter of it, and I would've seen it  
6 after the fact and would've worked with it in terms of some of  
7 the issues that we're now discussing, including some dealings  
8 with the trustee.

9 Q And in paragraph 1(a) clarifies the definition of  
10 purchased assets. Says at the end of that paragraph, purchased  
11 assets shall include.

12 Do you see that?

13 A Yes, I do.

14 Q And 1(a)(II)(C) includes within that definition of  
15 purchased assets exchange traded derivatives and any property  
16 that may be held to secure obligations under such derivatives.

17 Do you see that?

18 A Yes, I do.

19 Q And did you understand that phrase, when you first saw it,  
20 to reference margin or collateral pledged to secure exchanged  
21 traded derivatives?

22 MR. MAGUIRE: Objection, Your Honor.

23 THE COURT: What's the objection?

24 MR. MAGUIRE: I don't believe this witness' legal  
25 opinion or interpretation of the contracts that he saw after

1 the fact is admissible.

2 THE COURT: The question is whether the question  
3 should be asked, and I'm going to sustain the objection. He's  
4 already confirmed that he had nothing to do with the document,  
5 but he worked with the document, and so his views as to what it  
6 might mean are no better than that of any other lawyer.

7 MR. HUME: Right. I'm not trying to elicit an opinion  
8 on its meaning. Let me ask the question this way.

9 BY MR. HUME:

10 Q Was this language, Mr. Raisler, consistent with your  
11 understanding of the transaction from the perspective that you  
12 had?

13 A Yes. And to put a finer point on that, the e-mail that we  
14 had discussed a few minutes ago that I had sent to Mr. Kiplock,  
15 where I said we were not seeking collateral where there was not  
16 an open exchanged traded derivative decision is also consistent  
17 with the statement, it was only those accounts that open  
18 exchange traded derivatives, because that would be the  
19 collateral and those accounts would be property that may be  
20 held to secure obligations under such derivatives.

21 So, yes, this did inform me and help me prepare that e-mil  
22 of December 23rd that we focused on a minute ago.

23 Q And in your dealings with the trustee through to at least  
24 July of 2009, did the trustee ever express a view that was at  
25 odds with your understanding that all property held to secure

1 obligations under exchange traded derivatives were to be  
2 transferred to Barclays?

3 A No. The -- and in fact, the July communication doesn't  
4 take issue with it. It's silent. So even through July, from  
5 my point of view, there was no disagreement between us and the  
6 trustee about Barclays entitlement to that collateral.

7 Q And if I could just briefly direct your attention to tab  
8 24, you referenced a moment ago the transfer and assumption  
9 agreement that was signed by the trustee the night of the sale  
10 hearing.

11 In paragraph 1(a), it provides that for good and valuable  
12 consideration, Lehman hereby sells, assigns, transfers, and  
13 sets over to Barclays, I'm paraphrasing, but all of Lehman's  
14 rights, title, interest, powers, privileges, remedies,  
15 obligations and duties into and under in respect to the  
16 account, with respect to and romanet two says, all margin  
17 deposits held by OCC with respect to the account.

18 Do you see that language?

19 A Yes, I do.

20 Q And is that consistent with your understanding of the  
21 transaction from the perspective you had?

22 A Definitely.

23 Q And did the trustee, at any time, at least through July of  
24 2009 ever directly or indirectly suggest to you that they had a  
25 different understanding of the transaction?

1 A No. Not to my recollection, no.

2 Q Let me refer you to tab 10 of the binder. Are you -- do  
3 you recall generally, Mr. Raisler, that there was a inter-  
4 pleader filed by the OCC in this court, relating to certain  
5 letters of credit that were drawn down by the OCC at around the  
6 time of the sale transaction?

7 A Yes, I am generally familiar with that.

8 Q BCI Exhibit 978 is the trustee's answer to that inter-  
9 pleader complaint. I'll represent to you that the inter-  
10 pleader complaint puts at issue eighty million dollars that  
11 were posted as letters of credit by four different banks, drawn  
12 down by the OCC, and at some point, put into a suspense  
13 account, allegedly rather than Lehman's normal trading account.

14 And the trustee's answer, I'd refer you to page 12 on  
15 paragraph 51, his answer was filed February 6th, 2009.  
16 Paragraph 51 asserts, in the alternative, without the benefit  
17 of discovery, upon information and belief, LBI may be entitled  
18 to the funds, the funds is this eighty million dollars I  
19 referenced.

20 LBI may be entitled to the funds for several reasons, and  
21 under several possible scenarios, including without limitation  
22 the following: One, to the extent that the September 19th,  
23 2008 draw on the letters of credit by the OCC was in violation  
24 of OCC Rule 604(c), but the LC issuers are not as a result  
25 entitled to have the funds returned to them.

1 Do you see that?

2 A Yes, I do.

3 Q Okay. Romanet two says, to the extent that the LC  
4 proceeds were held by the OCC in a suspense account, and never  
5 deposited in LBI's or Barclays' margin account at the OCC, and  
6 accordingly, do not constitute purchased assets within the  
7 meaning of the purchase agreement, or margin deposits, or are  
8 not otherwise part of LBI's account within the meaning of the  
9 TAA, the transfer assumption agreement, LBI is entitled to the  
10 funds, and Barclays has acquired no interest in the funds.

11 Now, does this allegation by the trustee in February 2009  
12 suggest to you that the trustee was taking the position that  
13 Barclays had no entitlement to any margin deposits in any of  
14 Lehman's exchange traded derivatives accounts?

15 MR. MAGUIRE: Objection, Your Honor, to a lawyer being  
16 asked to construe a pleading, which he was not involved in or  
17 was not addressed to him, or directed to him, and which he did  
18 not prepare.

19 THE COURT: I'll sustain that objection, although it  
20 may be possible to get at the subject matter with a different  
21 question, and you have the ability, if you wish, to ask another  
22 question.

23 MR. HUME: This is when my questioning skills get put  
24 to the test.

25 THE COURT: Absolutely.

1 BY MR. HUME:

2 Q Mr. Raisler, does this phrase, reading it now, does it  
3 suggest to you that the trustee is taking the position here  
4 that Barclays is not entitled to any margin deposits in any  
5 Lehman exchange traded derivative account?

6 A No. By its terms it suggests the opposite. Because if  
7 the funds were in the margin account implicitly under romanet  
8 two, the inference from this language is that they would be  
9 available to be included in the account, and therefore,  
10 transferred.

11 Q Now, you are familiar with the fact that the trustee filed  
12 a Rule 60(b) motion in September 2009, generally familiar?

13 A Generally. Don't quiz me on that one either.

14 Q That's why we're here, one of the reasons. I'd like to  
15 refer you to tab 17, which is an excerpt from that trustee  
16 brief, and on page 25, the trustee has a new section of the  
17 brief entitled, the agreements do not convey exchange margin  
18 and clearing funds.

19 Do you see that?

20 A I do.

21 Q And in the next page, paragraph 71 says, the drafting  
22 history also indicates that the parties did not intend under  
23 the clarification letter to transfer any margin or clearing  
24 funds to Barclays.

25 Do you see that?

1 A I see that, yes.

2 Q Is that consistent with your understanding of the  
3 transaction that you worked on?

4 A Absolutely not.

5 MR. MAGUIRE: Objection.

6 THE COURT: What's the objection?

7 MR. MAGUIRE: I don't believe there's any foundation.  
8 This witness had nothing to do with the drafting history.

9 THE COURT: Well, you're absolutely right. He's  
10 already said he had nothing to do with drafting the  
11 clarification letter. The objection is sustained, but you can  
12 ask another question.

13 MR. HUME: Your Honor, I'll -- maybe I'll refine and  
14 more precisely ask the question as I did before.

15 BY MR. HUME:

16 Q Are these assertions consistent with the understanding you  
17 had of the transaction from the perspective you had and the  
18 work that you did that week September 15th, 2008?

19 MR. MAGUIRE: Same objection, Your Honor, with respect  
20 to these assertions specifically referring to the drafting  
21 history.

22 THE COURT: Sustained.

23 MR. HUME: Maybe I'll just ask the question on the  
24 previous assertion.

25 BY MR. HUME:



1 Q Does the assertion that no margin of any kind was being  
2 transferred, is that assertion consistent or inconsistent with  
3 the perspective you had of the transaction during September  
4 15th, 2008?

5 A Completely inconsistent as I have testified. It was my  
6 understanding throughout that week and thereafter, and the work  
7 that I did with the trustee, that margin and collateral would,  
8 in fact, be transferred.

9 Q So is this assertion inconsistent with all of your  
10 dealings with the trustee through to at least July 2009?

11 A Yes, it is.

12 Q Do you remember the first time you learned that the  
13 trustee was taking this position?

14 A I don't remember precisely. It would've been after that  
15 July letter. My best recollection is that we, after receiving  
16 the July letter, we asked for a meeting with the trustee, but  
17 my recollection's quite vague as to when that took place, and I  
18 think it was at that meeting for the first time that they  
19 raised questions about our entitlement to the margin. That was  
20 the first time I'd heard that assertion. So I think the second  
21 half of 2009.

22 Q Let me -- I don't think this is in your binder, but I want  
23 to pull up on the screen if I could the deposition of the  
24 trustee's 30(b)(6) representative, Mr. Jim Kobak to page 282  
25 and 283. And starting on page 282 at line 14, Mr. Kobak is

1 being shown something called the collateral agreement that was  
2 presented to him by the OCC and that he signed, and it says,  
3 quote, LBI has assigned to Barclays all rights and securities,  
4 cash and other property, defined as collateral, pledged by LBI  
5 to the Options Clearing Corporation and held for OCC's benefit  
6 at JP Morgan Chase.

7 Do you see that?

8 Answer, yes.

9 Question, and was it your understanding that that's what  
10 the trustee was authorizing when you signed this?

11 Answer, yes.

12 And was it your understanding that that's -- excuse me.

13 Yes.

14 And was it, yes, consistent with the overall deal that  
15 there be no cash excess that would go to Barclays, because that  
16 would be inconsistent with the no cash, and that this wouldn't  
17 make the deal so rich that it went way beyond the parameters  
18 that we discussed earlier?

19 Just two more questions and answers.

20 Question, did you tell anyone this, when you say you  
21 signed as consistent with the idea that there would be no cash,  
22 this says cash. This says cash will be transferred to  
23 Barclays.

24 Answer, yeah, but cash will be transferred against the  
25 liabilities. What I'm saying is, nobody told us there might be

1 in excess of a billion dollars of cash, or something like that,  
2 that would end up at Barclays when the deal was no cash, and  
3 when there was an economic parameter to the deal.

4 Last question and answer.

5 So to the extent the cash was simply needed to cover the  
6 liabilities, you thought it was possible to be included in the  
7 deal; is that correct?

8 Answer, yes.

9 Now, did anyone from the trustee, in your dealings with  
10 the trustee, from the time of the sale transaction through the  
11 summer of 2009, ever express this view of what margin should be  
12 transferred to Barclays and what should not?

13 A This is the first time I've seen this view expressed in,  
14 you know, in the middle of 2010. I've never seen this before  
15 and it was never discussed or raised in any of the meetings or  
16 discussions I had including discussions with the trustee.

17 Q Is your understanding that this view is inconsistent with  
18 the dealings you had with the trustee?

19 A Yes. It is inconsistent with my clear understanding of  
20 the transfer of all of the collateral and margins supporting  
21 exchanged traded derivatives in whatever form, whether it be  
22 cash, or securities, or any other instruments.

23 Q Do you understand sitting here now that I've shown you  
24 this, and shown you what the trustee said in his Rule 60 brief,  
25 is this consistent with what you were shown that the trustee

1 said in the Rule 60 brief?

2 A I think not. I mean, this is a very interesting but hard  
3 to reconcile position, at least with respect to the exchange  
4 traded derivatives.

5 Q This deposition was in December 2009. The Rule 60 brief  
6 was in September 2009. In March 2009, the trustee filed a  
7 reply brief, which is located at tab 25 of your binder. And if  
8 you'd turn to the last page excerpted, which is page 45,  
9 paragraph 101, it refers to the parenthetical expression, and  
10 this is the parenthetical expression in the clarification  
11 letter that you saw earlier. Do you recall that?

12 A Yes, I do.

13 Q And the title says, the parenthetical expression refers to  
14 two billion dollars in customer property, that LBI held, and  
15 does not give Barclays an additional four billion dollars in  
16 the margin assets that LBI posted.

17 The first sentence elaborates upon that assertion. The  
18 parenthetical, and it quotes with the parenthetical says, any  
19 property that may be held to secure obligations under such  
20 derivatives does not purport to transfer any margin, other than  
21 property that LBI held for its customers.

22 Is that position consistent or inconsistent with the  
23 dealings you had with the trustee from the time of the sale  
24 transaction all the way through the summer of 2009?

25 A For the record, I think you mean 2010, when you referred

1 to the date of this document, but this is incompletely  
2 inconsistent. There was no limitations. This was not strictly  
3 with respect to customer property. I testified extensively  
4 that the transfer was of the house or proprietary positions and  
5 all collateral, as well as the customer positions and all  
6 collateral, as well as, you know, any buffers and anything else  
7 that was in those accounts.

8 Q Did anyone at any time, Mr. Raisler -- did you have a  
9 general understanding at the time of the sale transaction that  
10 the collateral could be in the form of either cash or other  
11 forms of property and securities?

12 A Yes, absolutely. That traditionally would be the way in  
13 which collateral was held by a clearing member through a  
14 clearing bank or by the clearing house. It's a variety of  
15 instruments, including cash.

16 Q Did anyone -- I think I asked you before. Did anyone at  
17 any time suggest that whether the collateral would be  
18 transferred would depend upon whether it was cash or securities  
19 or other types of collateral?

20 A That issue never came up.

21 Q Did anyone ever address whether the transfer of the  
22 collateral would depend upon the maturity life of the  
23 securities, whether it was a three-month security, a six-month  
24 security or a longer maturity?

25 A That never came up.

1 Q Would it have made sense to you if it had?

2 A It would not. Basically, margin and collateral have a  
3 clear meaning. As I indicated earlier, that's the standard  
4 transfer instrument with the positions, goes all the collateral  
5 in whatever form, because that collateral supports the  
6 positions in the same way that what you see in the auction on  
7 the morning of the 18th, they were auctioning the positions and  
8 the buyers of those positions took all of the collateral. They  
9 didn't care whether it was cash or securities or bonds or  
10 whatever it was.

11 MR. HUME: Your Honor, I don't have any more  
12 questions, but I think I neglected to move two documents into  
13 evidence. I don't know whether I moved the letter at tab 9,  
14 BCI Exhibit 920.

15 MR. MAGUIRE: I have no objection to BCI 920, Your  
16 Honor.

17 THE COURT: It's admitted.  
18 (BCI's Exhibit No. 920 was received.)

19 MR. HUME: And BCI 978 at tab 10, the answer to the  
20 inter-pleader.

21 THE COURT: It's in the public record.

22 MR. MAGUIRE: No objection, Your Honor.

23 THE COURT: It's admitted.  
24 (BCI's Exhibit No. 978 was received.)

25 MR. HUME: Did I -- if I didn't move it in, BCI

1 Exhibit 979, which is the e-mail exchange between Mr. Raisler  
2 and Mr. Kiplock.

3 MR. MAGUIRE: No objection, Your Honor.

4 THE COURT: It's admitted.

5 (BCI's Exhibit No. 979 was received.)

6 MR. HUME: Thank you, Your Honor.

7 MR. MAGUIRE: Bill Maguire for the SIPC trustee, if I  
8 might approach, Your Honor.

9 THE COURT: Sure. Thank you.

10 MR. HUME: Thank you.

11 CROSS-EXAMINATION

12 BY MR. MAGUIRE:

13 Q Now, sir, you told us that you were not involved in the  
14 negotiations for the asset purchase agreement.

15 A That is correct. Actually, some of my partners at  
16 Sullivan & Cromwell were involved, but I was not.

17 Q And you understand that's the transaction that's at issue  
18 here, the asset purchase agreement?

19 A I think as a general matter, yes, they're obviously  
20 associated agreements we've talked about.

21 Q If we say, just so we're on the same wave length, if I  
22 refer to the deal or the transaction or the APA, what I'll be  
23 referring to is the asset purchase agreement.

24 A Fine.

25 Q And it's -- I believe it's true, is it not, sir, that you

1 never saw the APA until at least a substantial time after it  
2 had been entered into?

3 A I certainly didn't see it contemporaneously. I might have  
4 been told about -- I certainly was told about it, and it might  
5 have been something that was on some desk or some place, but I  
6 don't recall sort of spending any time with it until a  
7 substantial period after, yes.

8 Q And if you ever saw the clarification letter, that would  
9 only have been at the same time, that is a substantial time  
10 after it had been entered into.

11 A That's correct. I think the question of substantial, it  
12 could've been a matter of week or ten days, if that's your  
13 definition of substantial, I think we would agree.

14 Q And in terms of the events that you've talked about this  
15 morning and this afternoon about what you did during that week,  
16 the Lehman week, in the course of that, you had not spoken to  
17 anyone who was actually involved in negotiating the APA?

18 A I might've had a conversation with one of my partners and  
19 potentially had a negotiation with somebody from Cleary, but I  
20 don't recall any discussions about the substance of the APA.

21 Q And the people that you were dealing with on the Lehman  
22 side, you mentioned at least a Jeff Jennings, Ron Filler, you  
23 remember mentioning them.

24 A Yes, I do.

25 Q The people that you were dealing with that week, those



1 Lehman people were not responsible for negotiating the APA.

2 A They were not.

3 Q And none of your meetings with any of the Lehman people  
4 was a negotiation of the APA or of the clarification letter?

5 A It was not.

6 Q And so you don't know what the parties, what the business  
7 principals and their representatives agreed to in terms of the  
8 business negotiations?

9 A I have to take a little bit of issue with that, insofar as  
10 our instructions and the work we did throughout the week had  
11 embedded in it a set of assumptions. I would have --

12 Q And that's my point, sir. I want to put aside embedded  
13 assumptions, and ask you to direct yourself to your personal  
14 knowledge, and as a lawyer, you understand what personal  
15 knowledge is.

16 A Right.

17 Q You had no personal knowledge, you were not personally  
18 participating in any of the negotiations.

19 A That is correct.

20 Q You did not personally -- you were not present when any  
21 discussions occurred concerning the terms that were going into  
22 the APA.

23 A That is correct.

24 Q You were not present when the principles decided what the  
25 business agreement was.

1 A That is correct.

2 Q You do not therefore know what the business people said to  
3 each other on the subject of what would go into the APA?

4 A I think that's a fair statement.

5 Q You do not know what the business people said to each  
6 other or communicated to each other, specifically on the issue  
7 of Lehman's margin?

8 A I do not.

9 Q You do not know what they agreed amongst each other, what  
10 they specifically communicated to each other with respect to  
11 Lehman's cash?

12 A Also correct.

13 Q Or with respect to Lehman's cash equivalence?

14 A Also correct.

15 Q Now, you told us about your meeting on Monday,  
16 Sunday/Monday, I believe, this was a discussion about acquiring  
17 the futures business, and that was a siloed discussion, was it  
18 not?

19 A Yes, it was, at least until sometime late Monday, right.

20 Q Okay. And your understanding, however, didn't really  
21 change throughout the whole week. The understanding that you  
22 told us about this morning, you said basically it stayed the  
23 same.

24 A That is correct, with the signing and the announcement of  
25 the APA which we heard about, our mission did not change.

1 Q The idea of acquiring just the futures business, that  
2 however was totally overtaken by events, by the APA, right?

3 A Well, when you say totally overtaken, yes, we -- it  
4 obviously was overtaken in that sense, but the acquisition and  
5 transfer of those assets was still the mission statement that I  
6 was instructed to comply with.

7 Q The APA was a different deal than an acquisition in the  
8 futures business. It involved the whole markets business of  
9 Lehman, did it not?

10 A It was a different deal insofar as it was broader. But as  
11 with respect to my instructions and my responsibility, it was  
12 the same deal.

13 Q That was your under -- your embedded understanding from  
14 Sunday, Monday on in your siloed discussion, your understanding  
15 was -- remained the same throughout that whole week?

16 A That is correct.

17 Q And there was also some additional agreements that you had  
18 some involvement with, and that was addressing concerns of  
19 certain exchanges like the CME and the OCC?

20 A Right, and the COTC as well, right.

21 Q Okay. Now, you mentioned some other transactions that you  
22 had some experience in. One I believe was the FIA.

23 A The FIA is a trade association, Futures Industry  
24 Association, that I have been actively a member of. I've been  
25 on the board of the FIA for eighteen years. It itself is just

1 an industry trade association representing brokers and other  
2 market participants.

3 My comment was that it is through the work of the FIA that  
4 I was familiar with a number of these bankruptcies or near  
5 bankruptcy transfers of positions. Those position transfer  
6 activities occurred on their own, that is what I described  
7 Drexel or Kline or Griffin or whatever, it was in many cases,  
8 through the FIA that I learned about them.

9 Q So when you testified about the other deals that you were  
10 aware of, you're not suggesting that you were representing the  
11 transferor or the transferee in any of those deals?

12 A In the Drexel deal, to the best of my knowledge, we were  
13 one of the counsel involved in representing Drexel in the  
14 transfer of their futures business. With respect to the others  
15 I highlighted, there's one I believe I left out, in which we  
16 were more directly counsel, and that's a transfer from the SIM  
17 Group to Barclays. We represented Barclays in portions of that  
18 transaction that also was a transfer of futures positions and  
19 futures collateral.

20 Q And --

21 A But the others, you're correct, I was not representing any  
22 of the transferor or transferee parties.

23 Q And it's your understanding in those deals, that the  
24 business intent of the parties was that margin was included in  
25 the deal?

1 A And that was, in fact, what occurred, yes.

2 Q All right. And in none of those deals, did you understand  
3 it, did the parties have a business intent to exclude margin?

4 A Not to my knowledge, that's correct.

5 Q And so far as you're aware, in none of those deals, was  
6 there an explicit exclusion of all of the transferor's cash,  
7 cash equivalence, and highly liquid government securities?

8 A To my knowledge, each of those deals were consistent with  
9 what I testified earlier to, which is a pretty straight forward  
10 transfer of all the positions and assets and collateral in  
11 those accounts, yes.

12 Q And I believe you mentioned that if margin was to be --  
13 was not being transferred, then there would need to be some  
14 special provision, right?

15 A Yes, that's correct, particularly, vis-a-vie the  
16 regulators and the exchanges, because they need to have the  
17 margins to support the positions.

18 Q There would have to be a replacement margin?

19 A At a minimum, yes.

20 Q Were you privy to any of the communications between,  
21 e-mails between the OCC and Ed Rosen concerning replacement  
22 margin in connection with the APA?

23 A I probably did see some of those.

24 Q Were you involved in any discussions with the OCC or with  
25 Ed Rosen concerning the issue of replacement margin?

1 A I don't recall.

2 Q I believe you mentioned just a little while ago that you  
3 had not -- that the trustee had not taken issue with the notion  
4 that all margin was going to Barclays until sometime after July  
5 of 2009.

6 A That is correct.

7 Q And that the -- it was only after July of 2009 that the  
8 trustee first raised questions about Barclays' entitlement to  
9 margin.

10 A That's my best recollection.

11 Q In fact, you met the trustee's legal team before July of  
12 2009, specifically with respect to the dispute between the  
13 parties concerning Lehman's margin; did you not?

14 A My best recollection is when we transmitted the e-mail on  
15 December 23rd that we have discussed, that as of that time, we  
16 transmitted that e-mail to codify our position with respect,  
17 not just to the collateral issue, but also with respect to the  
18 getting an understanding about protecting the assets and  
19 identification of those assets.

20 As of that time, I do not recall any concerns being raised  
21 by the trustee to our rights to that collateral, but that  
22 December 23rd e-mail sought confirmation that the collateral  
23 was transferred.

24 Q You don't recall meeting with the trustee's litigators on  
25 this issue?

1 A I will confess we had a lot of meetings, and it certainly  
2 is possible, I don't recall it.

3 Q Do you recall visiting my office and meeting me?

4 A Please take no offense, I do not.

5 Q No offense taken. I obviously did not make much of an  
6 impression.

7 Do you recall whether there were meetings specifically  
8 before July of 2009, in which it was clear that the trustee did  
9 not accept Barclays' position with respect to margin?

10 A I don't recall them. As I say that in 2009, as I  
11 indicated in my testimony earlier, sometime in 2009, I thought  
12 it was after July, there was a meeting in which the issue of  
13 collateral was contested.

14 If it occurred before July, I can't say that that would be  
15 wrong, I just don't recall it.

16 Q You mentioned that following your e-mail to my partner,  
17 Carolyn Levine, there was radio silence, and you didn't receive  
18 anything indicating the trustee's position until July 15 of the  
19 following year. Do you recall that testimony?

20 A Right. As we --

21 MR. HUME: I think he's mischaracterizing the  
22 testimony, Your Honor, and the document.

23 THE COURT: Okay. I'll take that as an objection.  
24 the objection is that the question has just mischaracterized  
25 his testimony and a document. Maybe you just want to start

1 over.

2 MR. MAGUIRE: Sure.

3 BY MR. MAGUIRE:

4 Q With respect to the testimony you gave about radio  
5 silence, with respect to the trustee's position, are you with  
6 me?

7 A So far.

8 Q Okay.

9 A I'm waiting for a question.

10 Q Did you not hear from your client Barclays about a whole  
11 series of correspondence between the trustee and Barclays,  
12 specifically, Jonathan Hughes on the issue of disputed assets,  
13 including margin?

14 MR. HUME: Your Honor, the way that question is  
15 phrased does call for privileged communications. He's free to  
16 show the correspondence between Barclays and the trustee, and I  
17 think it'd be more helpful if he did, but this is asking what  
18 his client may have told him, so I object on privilege.

19 THE COURT: That objection is sustained.

20 BY MR. MAGUIRE:

21 Q Did you not, sir, personally receive an e-mail from my  
22 partner, Carolyn Levine, in April of 2009 specifically stating  
23 we do not concede Barclays' entitlement to each such deposit?

24 A Sitting here today, I don't recall it. I wouldn't dispute  
25 it, because I do recall that after December -- well, after



1 December 23rd's e-mail which we've discussed, there was a  
2 response from Ms. Levine in February, which is included in the  
3 e-mail chain. And then after that, as I indicated some time in  
4 2009, disputes were highlighted, but I don't remember whether  
5 -- I thought it was after the July letter. It could've been  
6 before.

7 MR. MAGUIRE: If I might approach, Your Honor.

8 THE COURT: Sure.

9 (Pause)

10 Q Sir, I've showing you a document that's being marked as  
11 Movant's Trial Exhibit 888, and that is an e-mail that you and  
12 others received from Carolyn Levine on April 3, 2009; is that  
13 correct?

14 A Yes.

15 Q And you'll notice in the second sentence of the e-mail,  
16 Ms. Levine says, quote, I did want to clarify that while we are  
17 working diligently to take the necessary steps including claims  
18 in relevant foreign proceedings, to secure any property held as  
19 margin on the various foreign exchanges, we do not concede  
20 Barclays' entitlement to each such deposit.

21 And that was your understanding, was it not, sir?

22 A As I indicated earlier, I do recall that the issue of  
23 collateral was contested at some point in 2009. This e-mail  
24 would indicate that that was as early as April, rather than  
25 after the July communication. I didn't recall this

1 communication, but I think the substance of it is consistent  
2 with what I indicated I thought occurred after July.

3 Q And it's clear that that happened well before July.

4 A It happened in April.

5 Q Now, sir, your understanding was that Barclays was taking  
6 over Lehman's futures business, and in that connection, there  
7 was a connection about whether there was sufficient seg and  
8 secured property, right?

9 A I'm sorry, I'm having a little trouble with your question.

10 Q Whether there was sufficient property that Lehman had in  
11 the customer seg and secured account.

12 A I'm sorry, I still need a little bit of context. There  
13 were a lot of issues that were of concern, that was one of  
14 them.

15 Q You wrote a letter to the CFTC.

16 A Yes.

17 Q And the basis for that letter, you testified to before,  
18 specifically to the representation that you understood there  
19 was sufficient property in Lehman's seg and secured accounts.  
20 The basis for that representation, what you told us you had to  
21 go on, was the fact that there was no default.

22 A That is correct.

23 Q And if there was no default in any of the exchanges, then  
24 you could infer that Lehman was compliant.

25 A Correct.

1 Q And, of course, we are -- you testified also about the  
2 Lehman buffer, and if I understand right, that is excess  
3 property that Lehman put into the customer seg and secured  
4 account, so that there would never be any deficiency with the  
5 exchange.

6 A I would radically disagree with the word never. I think  
7 that the buffer is put there to reduce the risk of the account  
8 being under seg'd. But it certainly is no guarantee because  
9 the market can move in ways that eat up whatever that buffer  
10 is, no matter how large it is. But it's a way in which firms  
11 put money in an account to avoid the risk or to reduce -- I'm  
12 sorry, to reduce the risk of being in a shortfall position.

13 Q There's two types of Lehman proprietary property, I  
14 believe you testified about. And one is the Lehman property  
15 that it had in its own accounts, and the other is the Lehman  
16 property that it put in the customer seg and secured accounts;  
17 is that right?

18 A Right. If you use Lehman broadly, because there's also  
19 Lehman affiliates, but yes.

20 Q Right. And Lehman affiliates were customers of Lehman,  
21 but their positions were in the house account, and their margin  
22 was in the house margin account.

23 A Under the regulations, the positions of affiliates are  
24 proprietary if there's any -- if there's ten percent or more  
25 overlapping ownership.

1 Q But with the correction that you make, and just reading  
2 Lehman broadly, the Lehman proprietary property was in two  
3 places. It was in the Lehman accounts or it was the excess  
4 that Lehman had put into the customer seg and secured.

5 A Right. And we're talking futures here, right?

6 Q Yeah.

7 A Yes.

8 Q And the excess you had used the term buffer.

9 A Correct.

10 Q That was the term that you used for the excess that Lehman  
11 put in the customer seg and secured accounts.

12 A Correct.

13 Q Now, at the time, you did not actually know that there was  
14 any -- that there were any Lehman assets in the customer seg  
15 and secured accounts, as well as the customer property.

16 A I would say I'm not familiar with any accounts that don't  
17 have a buffer in it. So I guess it would be to me quite -- I  
18 mean, you're correct in the sense that I didn't literally know  
19 it, but the fact is that would be standard and routine in the  
20 industry.

21 Q And you made a point about how that would be standard and  
22 routine. But as a fact, you did not have -- you didn't even  
23 have an understanding, one way or the other, at the time, as to  
24 whether there were any Lehman assets in the customer seg and  
25 secured accounts.

1 A Not sure that's right. The -- I'm not -- my recollection  
2 is not precise about this, in terms of what kind of information  
3 we received. But I certainly would have assumed, based on  
4 general knowledge, and perhaps specific knowledge that there  
5 was a buffer there.

6 Q If you turn, sir, to the deposition transcript. You  
7 should have in the small binder I just gave you, and it should  
8 be, I think, in tab 1. Do you have it there?

9 A I do.

10 Q If you could turn to page 130, reading at line 11. You'll  
11 see you were asked the following questions, and gave the  
12 following answers.

13 Question, did the accounts and the funds, the segregated  
14 and secured funds that were being moved in October, did they  
15 include LBI assets, as well as assets that were the property of  
16 customers?

17 Answer, I think I can answer that question this way. It  
18 was my understanding that all of the property that was in the  
19 seg and secured accounts moved to Barclays.

20 The next question, and at the time it was moved, sir, did  
21 you have an understanding one way or the other, as to whether  
22 the property included property of LBI, as well as property of  
23 customers?

24 Answer, I don't believe I had an understanding one way or  
25 the other, other than my best recollection was, that all of the

1 collateral in those accounts moved to Barclays.

2 You were asked those questions and you gave those answers;  
3 is that correct?

4 A That is correct.

5 Q Now, sir, you told us with respect to the Lehman  
6 proprietary positions, that you had limited information, and in  
7 fact, you gave us just a small example, you called it, was the  
8 VIX positions, those are the volatility index.

9 A Yes.

10 Q And I believe you gave that to us as a small example of  
11 proprietary positions that you understood were part of this  
12 deal.

13 A I gave that as an example of proprietary positions that we  
14 didn't learn about in our meetings with Lehman during the  
15 course of the week, and that we found out about late in the  
16 transaction, yes.

17 Q But they had been on the books all week was your  
18 understanding, right?

19 A They were not new positions, that's correct. They had  
20 been on the books, and they were positions, to the best of my  
21 recollection of affiliates of Lehman, and had not been brought  
22 to our attention.

23 Q And you felt they should've been brought to your  
24 attention.

25 A That is correct.

1 Q And it was your understanding at the time that they were  
2 part of the deal.

3 A That was our understanding, yes.

4 Q Okay. Now, did you discuss your understanding with Ed  
5 Rosen?

6 A I honestly don't recall.

7 Q If you'd turn to tab 5 of your binder, you'll see Movant's  
8 Trial Exhibit 736. And that is an e-mail from Ed Rosen to  
9 Robert Colby at the SEC.

10 Do you see that, sir?

11 A Yes, I do.

12 Q And if you look down at the body of the text you'll see he  
13 says, Bob, I tracked it down, just a junior associate at  
14 outside counsel to OCC that did not understand the conversation  
15 he was listening to. There are VIX futures positions in an  
16 account at OCC that are not part of the deal, but that as a  
17 practical matter, we have to take what the LBI OCC accounts.

18 Do you see that?

19 A I do, yes.

20 Q Now, that is not consistent with your understanding. Your  
21 understanding was that these were VIX were part of the deal;  
22 isn't that right?

23 A Yes.

24 Q So we have a disconnect between you and Ed Rosen on this  
25 subject; is that right?

1 A I don't know what Mr. Rosen's saying here, and I don't  
2 recall specifically talking to him about it. I do recall,  
3 though, that we spent a considerable amount of time over the  
4 weekend of the 20th, 21st of September discussing the  
5 consequences of taking on this position as part of the  
6 proprietary account of Lehman.

7 Q And because you personally were not privy to the  
8 negotiations of the deal, you're not in a position to tell us  
9 one way or the other from your personal knowledge, whether  
10 these VIX positions were part of the deal or were not part of  
11 the deal?

12 A I can only say I was doing an awful lot of work  
13 unnecessarily if they were not part of the deal.

14 Q But you have no knowledge either way, no personal  
15 knowledge?

16 A Well, my history tells me that clients don't usually ask  
17 me to do work unnecessarily, so my inference is a pretty safe  
18 one.

19 Q We're all capable of leaping to inferences and judgments,  
20 and some of them may be entirely right, and some of them may  
21 not be, and that's why I'm really not asking you for your  
22 inference. I'm asking for your personal knowledge. And as a  
23 lawyer, you understand exactly what I'm asking you for; isn't  
24 that right, sir?

25 A I just disagree with you on the word leap, yes.



1 Q Okay. Leaving aside your inferences, you have no personal  
2 knowledge of what the negotiators of the APA put in the deal or  
3 didn't put in the deal.

4 A We've agreed on that earlier, yes.

5 Q Okay. Now, you did testify about Lehman's margin that it  
6 had posted on his proprietary future positions, and  
7 specifically referred to initial margin, right?

8 A Yes.

9 Q And you understood that that was part of the deal, right?

10 A Yes.

11 Q Now, were you aware that on the Thursday night and the  
12 Friday morning, and through Friday, Barclays' negotiators set  
13 off a scramble to find additional assets to add to this deal?

14 A I'm not aware of that.

15 Q You were not in any way involved in the Friday asset  
16 scramble?

17 A I was not.

18 Q If you turn, sir, to tab 6 of your binder. There, sir,  
19 you'll see an e-mail exchange between two Barclays senior  
20 executives. That's Movant's Trial Exhibit 620.

21 And you'll see at the bottom, Stephen King says to Patrick  
22 Clackson on Thursday night, why don't we add the initial margin  
23 on the repos.

24 Do you see that, sir?

25 A I do.

1 Q And you'll see the response, a further follow-up rather  
2 from Mr. King again to his colleague, Patrick Clackson. He  
3 says, sorry, I meant, exchanges and clearing houses.

4 Do you see that?

5 A I do.

6 Q So you see that here Stephen King is suggesting adding  
7 initial margin at the exchanges and clearing houses.

8 Do you see that?

9 A I must confess I don't have a context for this e-mail to  
10 understand what it means.

11 Q You were not aware that there was any suggestion by any  
12 senior Barclays' executive that Lehman margin be added to the  
13 deal; isn't that right?

14 A Lehman margin was already in the deal, I don't understand  
15 what you're saying.

16 Q Well, exactly. If Lehman margin was already in the deal,  
17 then there would be no need to add it on Thursday night, right?

18 A I have no basis to comment on what you're saying, because  
19 this e-mail doesn't give me any insight at all to what was  
20 going on.

21 Q And you certainly weren't privy to any discussions with  
22 either Mr. King or Mr. Clackson, right?

23 A That is correct.

24 Q And you don't know what Mr. Clackson, if anything, what he  
25 did in response to the suggestion that margin be added to the

1 deal?

2 A I do not.

3 Q You testified, sir, about the liquidation at the CME,  
4 Chicago Mercantile Exchange.

5 A Correct.

6 Q That was an auction, it was auctioned off?

7 A That was what I was informed of, yes.

8 Q Now, you understand that one of the winning bidders in  
9 that auction was none other than Barclays itself?

10 A I learned that after. I don't recall how soon after, yes.

11 Q Now, are you aware, sir, whether the winning bid contained  
12 a specific language requiring the transfer of Lehman margin, as  
13 the price for that bid?

14 A I'm not privy to those negotiations or the terms of those  
15 deals. What I was told is that the margin moved with the  
16 positions, but I don't know how that was reflected or  
17 memorialized.

18 Q And so you can't tell us whether any of that language was,  
19 in any way, put into the APA or the clarification letter?

20 A I'm sorry. I lost you on APA.

21 Q The bid language. When Barclays bid for the winning  
22 position at the CME, and said, we'll take this position, but  
23 we've got to have the margin. When Barclays said that, you  
24 don't know whether the language that Barclays used, Barclays  
25 also put in the APA or the clarification letter.

1 A I'm sorry, I'm just having trouble making the, I'll use  
2 your word, leaps that you're proposing here. I don't follow  
3 your question, I'm sorry.

4 Q Okay. But you haven't seen the Barclays' bid?

5 A The Barclays' bid at the auction?

6 Q Right.

7 A I have not.

8 Q Okay. I believe there came a time, did there not, where  
9 the CME asked for a guarantee of customer positions; is that  
10 right?

11 A No, the CME asked -- well, actually, it's two parts. The  
12 CME asked for a guarantee of the proprietary positions on  
13 Wednesday evening.

14 Q Not then.

15 A Then on some time on Friday, the CME asked for a guarantee  
16 of the customer positions for purposes of the opening on  
17 Monday.

18 Q And Barclays agreed?

19 A Yes.

20 Q And gave that guarantee?

21 A Yes.

22 Q Have you seen that guarantee?

23 A Yes.

24 Q Is it in writing?

25 A Yes.

1 Q The discussions that you had with the exchanges, they were  
2 at a very high level, were they not?

3 A I'm sorry?

4 Q Well, for example, you weren't looking at what nature or  
5 types of positions the Lehman positions were at the exchanges.  
6 You were focused really on whether the exchanges saw, if there  
7 was any impediment, to moving positions to Barclays, right?

8 A I think there were two things. I mean, you're correct, I  
9 wasn't looking at details of positions, because among other  
10 things, that was proprietary to Lehman and not us, but we  
11 needed to know in terms of whether there were any impediments,  
12 whether -- what the positions were, what the contours generally  
13 speaking of those positions were.

14 Q And --

15 A So there were some specifics not going beyond just were  
16 there any impediments, in terms of understanding what those  
17 positions were.

18 Q And there came a time when the OCC made a similar demand,  
19 certainly a request of Barclays that the CME had made, they  
20 wanted a guarantee as well.

21 A That is correct.

22 Q And, in fact, you spoke with the CME and that was  
23 specifically a request by the OCC for a guarantee with respect  
24 to customer positions, right?

25 A I'm sorry, can I get that question read back.

1 Q Sure. Let me give you a new question.

2 A Because I think you added something in that I didn't  
3 follow.

4 Q Okay. You did get a demand from the OCC, right?

5 A Yes.

6 Q And they wanted a guarantee. They were insecure, right?

7 A That is correct.

8 Q And they wanted to make sure that the positions would be  
9 secured by Barclays over the weekend?

10 A They specifically wanted to be assured that when Monday  
11 opened that the margin that was required, would be posted by  
12 Barclays, if necessary.

13 Q Again, over the weekend, over the settlement period?

14 A That is correct. We're talking about the 20th and 21st.

15 Q And here specifically, customer positions.

16 A I'd have to look again, I thought it was both customer and  
17 house, but it may have been limited to customer.

18 Q If you'd turn to page 51 of your deposition transcript,  
19 sir, you'll see starting at line 7.

20 A I'd be more comfortable on relying on the actual documents  
21 than my deposition transcript, but.

22 Q I want to give your recollection and your testimony at  
23 your deposition and that is,

24 Question, to your knowledge, sir, was Barclays asked to  
25 guarantee any other of Lehman's customer positions at any time

1 between the 15th of September and the closing of the  
2 transaction on the 22nd?

3 Witness, I'm sorry, could I have that read back.

4 Record is read back.

5 Answer, OCC made a similar demand. I think before the  
6 break, I was not certain about conversations with OCC that  
7 week, but I did have conversations with OCC that Thursday and  
8 Friday, in which they were insecure.

9 Friday is actually an expiration date for options and they  
10 wanted to make sure that the positions would be secured by  
11 Barclays, again, over the weekend, during the settlement  
12 period, and here specifically customer positions.

13 So you were asked that question and you gave that answer;  
14 is that correct, sir?

15 A Yes, that's correct.

16 MR. HUME: Your Honor, I know that sometimes the Court  
17 refers this on redirect, but for completeness, I would ask the  
18 question and answer on page 52, lines 12 to 15 also be read  
19 back.

20 THE COURT: Why don't we put the context in now.

21 MR. MAGUIRE: Sure.

22 BY MR. MAGUIRE:

23 Q At page 52, line 12,

24 Question, was the demand made by the OCC for a guarantee  
25 of customer positions at the OCC, or firm positions at the OCC

1 or both?

2 Answer, my recollection it was both.

3 A That is my best recollection.

4 Q And then it goes on, starting at line 16,

5 Question, and did the demand, sir, to your knowledge  
6 relate only to the futures that were cleared through the OCC or  
7 was all positions, including equity options that were cleared  
8 through the OCC?

9 Answer, it's interesting because as of Thursday and Friday  
10 we were not aware that there were any futures positions. So it  
11 would have been at least in our thinking exclusively with  
12 respect to the options positions.

13 Right?

14 A Correct, as of Thursday or Friday.

15 Q So as of then, you weren't even aware that there were any  
16 Lehman futures positions.

17 A That was the VIX discussion we alluded to earlier, yes.

18 Q Now, sir, you testified a little earlier about the  
19 transfer and assumption agreement, and I think you'll find that  
20 at tab 7 of the small binder that I gave you.

21 And I believe you testified that you were not aware of any  
22 substantial windfall that Barclays got as a result of entering  
23 into the transfer and assumption agreement. Do you recall  
24 generally that testimony?

25 A Not in that context, no. I recall talking about the



1 transfer and assumption agreement. I talked -- I also  
2 responded to questions that I was not aware of any windfall or  
3 substantial windfall. I don't recall any connection between  
4 the two.

5 Q Sure.

6 A That is, signing has had any effect on windfalls or non-  
7 windfalls.

8 Q Sure. Now, on tab 7, we have Barclays' Exhibit No. 286.

9 Do you see that?

10 A Yes.

11 Q And if you turn in a couple of pages, you'll see -- well,  
12 you see first of all in the first page, it's 7:51 a.m., and  
13 it's from Michael A. Masuki (ph), and he says, sorry for the  
14 delay on this, the executed agreement is attached in connection  
15 with the closing call, which is starting now.

16 Do you see that?

17 A Yes.

18 Q So this is the signed transfer and assumption agreement  
19 that's attached to this e-mail.

20 Do you see that?

21 A Yes.

22 Q And that's being provided to the OCC just as the closing  
23 of the APA is underway.

24 A I candidly am not familiar with the exact timing of the  
25 closing of the APA, so I can't comment on that, but it is at

1 751.

2 Q But you are aware, I believe you saw earlier in the course  
3 of Mr. Hume's testimony, that the OCC was pressing, indeed  
4 threatening liquidation if it did not get the signed transfer  
5 and assumption agreement from Barclays.

6 Do you remember seeing that?

7 A That is correct.

8 Q Do you know why Barclays did not provide the executed  
9 transfer and assumption agreement to the OCC, despite all of  
10 those demands until nearly 8:00 o'clock on Monday morning?

11 A As I testified earlier, I wasn't a participant in the  
12 drafting or the delivery of this document, so I don't know.

13 Q If you'd turn, sir, to page 2 of the document, and I say  
14 the document, I'm referring to the attached transfer and  
15 attachment agreement.

16 A Correct.

17 Q You'll see there's a section called representations and  
18 warranties, heading two at the top. And if you scroll down to  
19 item C, you'll see that Barclays hereby, little I, represents  
20 and warrants, that it has received such documents and other  
21 information as it has deemed appropriate to make its own credit  
22 analysis and decision to enter into this agreement.

23 A I do see that.

24 Q Do you know who did that credit analysis?

25 A I do not.

1 Q Do you know when that credit analysis was completed?

2 A I do not.

3 Q I take it, sir, that you told us you had not negotiated  
4 the transfer and assumption agreement, right?

5 A Right.

6 Q And you have never submitted this agreement to this Court  
7 for approval; is that right?

8 A Having never seen and negotiated it, no, I have not  
9 submitted it to the Court for approval, right.

10 MR. MAGUIRE: I have no further questions, Your Honor.

11 THE COURT: Any other questions by the movants?

12 MR. GAFFEY: No questions, not from the debtor, Your  
13 Honor.

14 THE COURT: Any redirect?

15 MR. HUME: Very brief, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. HUME:

18 Q Mr. Raisler, you were asked some questions by Mr. Maguire  
19 about what month in 2009 you may have heard the trustee raising  
20 questions about Barclays' entitlement to margin. Do you recall  
21 that?

22 A Correct. The testimony was some time in 2009, and there  
23 was some disagreement whether it was earlier or later in the  
24 year.

25 Q Now, the record will capture my questions as they were

1 stated, but I believe my questions to you were, when do you  
2 recall the trustee first taking the position that Barclays was  
3 not entitled to any margin? Do you know the answer to that?

4 A I do not. The document that Mr. Maguire showed me in  
5 April just basically reserved their rights in saying that we  
6 reserve our rights with respect to collateral. It didn't say  
7 anything about entitlement or non-entitlement.

8 Q Mr. Maguire mentioned a meeting that he recalls you  
9 attending, where you didn't recall meeting him. Do you recall  
10 generally attending a meeting at Hughes Hubbard with a lot of  
11 lawyers?

12 A I do recall more than one meeting at Hughes Hubbard  
13 probably in the same calendar year.

14 Q Do you recall in any of those meetings being not just  
15 having entitlement to certain margin questioned, maybe without  
16 a reason, but being told point blank, the trustee doesn't think  
17 Barclays is entitled to any margin for exchanged traded  
18 derivatives?

19 A I do not recall that being said at any meeting.

20 Q You were shown some deposition testimony on page 130  
21 regarding your understanding -- whether you had an  
22 understanding one way or the other, of whether a customer seg  
23 and security account would include LBI property. Do you  
24 remember that?

25 A Correct.

1 Q Your testimony was that you would normally -- your normal  
2 experience would tell you that it is, but you didn't know for  
3 certain literally what was in Lehman's accounts. Do you recall  
4 that?

5 A That is correct.

6 Q And Mr. Maguire showed you the testimonies about not  
7 having an understanding one way or the other at the bottom of  
8 page 130, 131. I just for completeness, want to show you the  
9 next question and answer.

10 On 131, line 4,

11 Question, just based on your general experience and  
12 familiarity with the industry, sir, would you have expected the  
13 property in those seg and secured accounts that moved to  
14 Barclays to include LBI property, as well as customer property?

15 Answer, yes.

16 Do you see that?

17 A Correct. And that's consistent with my testimony in  
18 answering Mr. Maguire's question that I would be surprised if  
19 there were not some buffer funds, the amounts would vary, but  
20 that would be typical, and that's what my testimony at the  
21 deposition reflected as well.

22 Q And that -- was that to your testimony to Mr. Maguire even  
23 before he showed you the deposition?

24 A Yes, it was.

25 Q Now, Mr. Maguire also asked you about the VIX positions,

1 and whether you had an understanding that the VIX positions  
2 were in the deal, and Mr. Rosen had an understanding that they  
3 were not in the deal. Do you recall that?

4 A Yes.

5 Q And he pointed you to an e-mail at tab f5 of his binder.

6 A Correct.

7 Q Now, when Mr. Maguire asked you that question, was it one  
8 hundred percent clear to you what he meant by the words, in the  
9 deal?

10 A As I think I testified and answered to Mr. Maguire, I  
11 didn't understand what Mr. Rosen is saying here. I did  
12 understand, based on the work I was doing and the discussions I  
13 had with Barclays and Lehman, that the VIX were in the deal,  
14 and that we were going to have to absorb the risks associated  
15 with those positions, and nothing that I recall disputed that.

16 Q All right.

17 A And no document I saw was different than that.

18 Q And what I would like to do, and my question is, be  
19 precise as possible as to what is meant by, in the deal.

20 Did you understand, based on what you were doing that  
21 week, that Barclays was assuming settlement obligations at the  
22 OCC for all the positions traded through Lehman's accounts at  
23 the OCC?

24 A Yes.

25 Q If there were accounts -- if there were positions held by

1 a Lehman affiliate, that were traded in those LBI accounts at  
2 OCC, are those in the deal or not in the deal?

3 A Yes. You've made a useful clarification and it's one that  
4 is referenced in an earlier document that we discussed in  
5 questions you asked me. And that is that to the extent that an  
6 affiliate transaction was part of the transfer, Barclays  
7 assumed all of the risks to the exchange clearing house, in  
8 this case OCC, associated with the settlement. And to the  
9 extent that they could not recover those funds from the Lehman  
10 affiliate they would, if you will, eat or write a blank check  
11 associated with those losses.

12 And in that sense I considered the VIX deal and all of the  
13 activities that had occurred under the umbrella of the Lehman  
14 clearing member to be in the deal. But I appreciate that as  
15 far as the distinctions, if you will, between the PIM account  
16 and the non-PIM customers that we talked about earlier, that in  
17 the deal and out of the deal could be more subtle.

18 But as far as the risk goes, which was what I was focused  
19 on, it was absolutely a risk to the clearing house that  
20 Barclays was assuming with respect to those VIX transactions.

21 Q And is that risk impacted by the reality that a Lehman  
22 affiliate might own positions, and a Lehman affiliate might be  
23 bankrupt?

24 A Absolutely. I mean the risk was profound, in that the  
25 question of recovering the same risks that OCC and the CME had

1 expressed to me and to Barclays are reflected in that dialogue  
2 as well. The ability of these affiliates to perform and meet  
3 margin calls on a position that's a very large short volatility  
4 exposure was a real risk, and that was a risk that Barclays was  
5 assuming and was, if you will, stuck with as part of the deal.

6 Q And looking now back at the e-mail that Mr. Maguire showed  
7 you, do you believe there was a disconnect between what your  
8 understanding was and what Mr. Rosen's understanding was?

9 A If Mr. Rosen is talking about being not part of the deal  
10 in the way we've just described it, that is the risk of  
11 settlement and the risk to the clearing house being absorbed by  
12 Barclays, but the ownership of the position not being, because  
13 the position continues to be owned by the Lehman affiliate, I  
14 don't think there's any disconnect. I think Mr. Rosen and I  
15 agree as to what was transpiring with respect to those  
16 transactions.

17 Q And finally, Mr. Raisler, you were asked a number of  
18 questions about what you knew about what was specifically  
19 communicated between negotiators that week. Do you recall  
20 that?

21 A I do.

22 Q And did you agree that you didn't know what was  
23 specifically communicated that week regarding certain issues?

24 A That is correct. I was not in the room, and was not privy  
25 to those discussions.



1 Q Did you mean by that testimony to suggest that even after  
2 the closing, when you saw the transfer and assumption  
3 agreement, and saw other documents, you never knew what was  
4 communicated in any way in writing, or did you mean you didn't  
5 know what was specifically said orally between negotiators?

6 A My comment was more contemporaneous, that as not being a  
7 participant in the negotiation and development of these  
8 documents, I didn't have a real-time view, but obviously after  
9 the fact, I participated in a lot of discussions with a lot of  
10 participants who were in the room, and did from that glean  
11 information, yes.

12 MR. HUME: No further questions.

13 THE COURT: Is there anything more?

14 MR. MAGUIRE: Nothing further, Your Honor.

15 THE COURT: Mr. Raisler, we thank you very much.  
16 You're excused.

17 THE WITNESS: Thank you.

18 THE COURT: We're adjourning for the day. I just  
19 wanted to inquire about the Daubert motions that are scheduled  
20 for Friday, and to get an idea assuming counsel can provide me  
21 with when as to approximately how long it's assumed that  
22 argument will take, whether or not any demonstratives will be  
23 required, and what I should be expecting.

24 MR. GAFFEY: I think they're having some discussions,  
25 Your Honor, that put the estimates of the time the parties need

1 at roughly an hour and a quarter each. There will be some  
2 demonstratives. We'll have the screen. There will be a couple  
3 of charts and things, so we're going to leave the equipment, to  
4 the extent that we can.

5 THE COURT: I'm expecting you to leave the equipment  
6 for the duration, frankly, but it's yours to take away if you  
7 wish.

8 I'm just wondering whether or not we should start,  
9 since we don't have witnesses to deal with, let's start at  
10 10:00 instead of at 9:30.

11 MR. GAFFEY: That's fine, Your Honor. On that issue,  
12 I wanted to inquire, I think there are no fact witnesses, and I  
13 wondered if we can establish whether Barclays has now concluded  
14 with its factual case?

15 MR. SCHILLER: No, we have not.

16 THE COURT: According to my schedule, they have, but I  
17 don't know if there's another witness waiting in the wings.

18 MR. SCHILLER: We have two video depositions to play  
19 that are in total an hour and forty-two minutes, and I may have  
20 a witness in the wings based on Your Honor's question -- first  
21 question to Ms. Leventhal as to timing. I've looked at  
22 deposition transcripts this afternoon that I may want to call  
23 someone to -- for fifteen minutes, twenty minutes of testimony  
24 on that issue on September 20th, Your Honor.

25 THE COURT: Okay.

1 MR. SCHILLER: Thank you.

2 MR. GAFFEY: Can I know who that is, Your Honor?

3 MR. SCHILLER: I'll let you know once I decide which  
4 would probably --

5 MR. GAFFEY: Could I have some notice, Your Honor?

6 MR. SCHILLER: Yeah, I'll give you notice on Monday.  
7 It's a week in advance.

8 MR. GAFFEY: Thank you, Your Honor.

9 THE COURT: Okay. 10:00 o'clock tomorrow.

10 MR. SCHILLER: Thank you.

11 THE COURT: Early dismissal today.

12 MR. UNIDENTIFIED: Friday, Your Honor.

13 THE COURT: I'm sorry, Friday.

14 (Whereupon, the proceedings were concluded at 3:39 p.m.,  
15 September 8, 2010.)

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C E R T I F I C A T I O N

I, Dena Page, certify that the foregoing transcript is a true  
and accurate record of the proceedings.

\_\_\_\_\_  
Dena Page

Veritext

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Date: September 10, 2010